(16)

No. 90-50-CFX
Status: GRANTED

Title: Ellis P. Gregory, Jr. and Anthony P. Nugent, Jr., Judges, Petitioners
v.
John D. Ashcroft, Governor of the State of Missouri

Docketed:
July 3, 1990

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Guilfoil,Thomas J., Livingston,Bruce D.

Counsel for respondent: Boicourt,Michael

NOTE: See mail label re dock dt 052490 ext until 070390 by Blackmun, J.-CITED

Entry	Date	Note	Proceedings and Orders
1	May 23 1990	G	Application (A89-834) to extend the time to file a petition for a writ of certiorari from June 3, 1990 to August 2, 1990, submitted to Justice Blackmun.
2	May 24 1990		Application (A89-834) granted by Justice Blackmun extending the time to file until July 3, 1990.
3	Jul 3 1990	G	Petition for writ of certiorari filed.
4	Aug 8 1990		DISTRIBUTED. September 24, 1990
5	Aug 20 1990	F	Response requested -- HAB.
6	Oct 23 1990		Response due on or before October 25, 1990.
7	Oct 30 1990		Order extending time to file response to petition until November 6, 1990.
8	Nov 5 1990		Brief of respondent Ashcroft, Gov. of MO in opposition filed.
9	Nov 7 1990		REDISTRIBUTED. November 21, 1990
10	Nov 13 1990	X	Reply brief of petitioners Ellis Gregory, et al. filed.
11	Nov 26 1990		Petition GRANTED.
			**********
12	Dec 5 1990	G	Application (A90-432) for an injunction, submitted to Justice Blackmun.
13	Dec 5 1990		Application (A90-432) granted by Justice Blackmun. The State of Missouri and Governor of Missouri are enjoined from enforcing against applicant Nugent the Missouri state constitutional provision mandating retirement and the Missouri state statutory provision requiring forfeiture of salary, pending sending down of judgment of this Court.
14	Dec 26 1990		Record filed.
		*	Certified copy of C. A. Proceedings, 2 volumes, received.
16	Jan 4 1991		Order extending time to file brief of petitioner on the merits until January 14, 1991.
17	Jan 9 1991		Brief amicus curiae of Honorable John W. Keefe filed.
18	Jan 11 1991		Record filed.
		*	Certified copy of original record received.
19	Jan 14 1991		Brief amicus curiae of American Assn. of Retired Persons filed.
20	Jan 14 1991		Brief of petitioners Gregory, Ellis, et al. filed.

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No. 90-50-CFX

Entry	Date	Note	Proceedings and Orders
21	Jan 17 1991		Joint appendix filed.
25	Jan 29 1991	D	Motion of John W. Keefe for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
22	Feb 1 1991		SET FOR ARGUMENT MONDAY, MARCH 18, 1991. (2ND CASE)
23	Feb 8 1991		Brief amicus curiae of Connecticut filed.
24	Feb 12 1991	G	Motion of Missouri Bar for leave to file a brief as amicus curiae filed.
27	Feb 15 1991		Brief amici curiae of National Governors' Association, et al. filed.
28	Feb 15 1991		Brief amicus curiae of Washington Legal Foundation filed.
29	Feb 15 1991		Brief of respondent Ashcroft, Governor of Missouri filed.
30	Feb 15 1991		Brief amicus curiae of Vermont filed.
31	Feb 15 1991		Brief amici curiae of Colorado, et al. filed.
26	Feb 19 1991		Motion of John W. Keefe for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
32	Feb 21 1991		CIRCULATED.
34	Feb 22 1991	G	Application (A90-642) to file a reply brief on the merits in excess of page limits, submitted to Justice Blackmun.
35	Feb 23 1991		Application (A90-642) granted by Justice Blackmun, allowing a maximum of 30 pages.
33	Feb 25 1991		Motion of Missouri Bar for leave to file a brief as amicus curiae GRANTED.
36	Mar 11 1991	X	Reply brief of petitioners Gregory, Ellis, et al. filed.
37	Mar 18 1991		ARGUED.

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90-50

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HONORABLE ELLIS GREGORY, JR. and THE HONORABLE ANTHONY P. NUGENT, JR.,

Petitioners,

VS.

THE HONORABLE JOHN D. ASHCROFT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether appointed Missouri state court judges are "appointee[s] on the policymaking level" within the meaning of the Age Discrimination in Employment Act ("ADEA"), 28 U.S.C. §§621-34 (1982 & Supp. V 1987), and therefore exempted from the ADEA's general prohibition of mandatory retirement and thus subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution?

II.

Whether the mandatory retirement at age seventy of Missouri state court judges, pursuant to Article V, Section 26 of the Missouri Constitution, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, given Missouri's selective imposition of mandatory retirement only upon its judges among all of its employees in non-physically demanding jobs?

LIST OF PARTIES

The plaintiffs in the proceeding below, in addition to the petitioners, the Honorable Ellis Gregory, Jr. and the Honorable Anthony P. Nugent, Jr., were the Honorable Douglas W. Greene and the Honorable Flake L. McHaney. Respondent, The Honorable John D. Ashcroft, governor of the State of Missouri, was the only defendant below. The United States Equal Employment Opportunity Commission appeared as *amicus curiae* in the court of appeals.

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VS.

THE HONORABLE JOHN D. ASHCROFT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Honorable Ellis Gregory, Jr. and the Honorable Anthony P. Nugent, Jr. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (App. A, *infra,* A-1 - A-16) is reported at 898 F.2d 598. The opinion of the district court, (Hungate, J.) (App. B, *infra,* A-17 - A-26) is unreported.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 5, 1990. On May 24, 1990 this Court extend-

ed the time for filing a petition for writ of certiorari to and including July 3, 1990.

Petitioner seeks this Court's review pursuant to 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 623(a) provides:

> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 630(f) provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C. § 631(a) provides: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

Article V, Section 26 of the Missouri Constitution provides:

> (1) All judges other than municipal judges shall retire by the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.
>
> (2) All judges may retire at an earlier age authorized by law and may participate in a retirement plan provided by law.
>
> (3) Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge he shall have the same powers as an active judge.

Article V, Section 25(a) of the Missouri Constitution provides:

Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson county, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy.

STATEMENT OF THE CASE

1. *Introduction.* One of the questions presented by this petition involves the statutory interpretation of the meaning of the term "appointee on the policymaking level," as used in the Age Dicrimination in Employment Act ("ADEA"), 29 U.S.C. § 630(f), which defines the person exempted from the protections of the ADEA. The other question presented is whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes the State of Missouri from differentiating between its judges, among all of its employees in non-physically demanding jobs, by requiring under Article V, § 26 of the Missouri Constitution that non-municipal state court judges retire upon attaining the age of seventy.

The ADEA prohibits employers from discharging any individual because of the individual's age and from classifying its employees in ways that adversely affect an individual's status as an employee because of the individual's age. 29 U.S.C. § 623(a). The ADEA's prohibitions apply to individuals who are at least forty years of age. 29 U.S.C. § 631(a). The State of Missouri is an "employer" under the ADEA. 29 U.S.C. § 630(b).

Article V, Section 26 of the Missouri Constitution requires that all non-municipal judges "shall retire at the age of 70 years." Mo. Const. art. V, § 26. Accordingly, as employees of the State of Missouri who are over the age of forty when they reach the mandatory retirement age set by the Missouri Constitution, appointed state court judges are entitled to the protections of the ADEA unless they fall into the statutory exemptions of section 630(f). Specifically at issue in the first question presented is whether Congress' use of the undefined term "appointee on the policymaking level" in the list of persons excluded from the definition of "employee" in 29 U.S.C. § 630(f) can be construed to encompass appointed state court judges.

The second question presented is whether the State of Missouri's imposition of a mandatory retirement age upon only its judges, among all of its employees in non-physically demanding jobs, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. *Proceedings In The District Court.* Petitioners and two other Missouri state court judges filed suit in the United States District Court for the Eastern District of Missouri to challenge the validity of the provision of the Missouri Constitution that mandates their retirement upon reaching the age of seventy. *See* Mo. Const. art. V, § 26(1) (1945 as amended 1976) (the "Mandatory Retirement Provision"). Petitioners claimed that the Mandatory Retirement Provision violated both the ADEA and the Equal Protection Clause of the Fourteeenth Amendment.

On July 14, 1989 the district court, the Honorable William L. Hungate, Judge, granted the motion to dismiss filed by the respondent herein, the Honorable John D. Ashcroft, governor of the State of Missouri. The district court held that Missouri's appointed state court judges did not fall within section 630(f)'s exemption from the definition of "employee" as persons "elected *to* public office." App. B at A-20 n.3 (emphasis by the court). *See* App. C at A-27 (Missouri constitutional section that provides mechanism for retention of appointed judges in

office). Judge Hungate ruled, however, that appointed state court judges are exempted from ADEA coverage under another portion of section 630(f) as "appointee[s] on the policymaking level." App. B at A-20.

In dismissing petitioners' equal protection claim, the district court ruled that Missouri has a rational basis for its imposition of a mandatory retirement age upon its judges. App. B at A-23. Judge Hungate relied upon a Missouri Supreme Court opinion, *O'Neil v. Baine,* 568 S.W.2d 761 (Mo. 1978) (en banc), as support for his finding that Missouri has a rational basis for the Mandatory Retirement Provision. Among the rational bases found by the district court were that the Mandatory Retirement Provision would insure a vigorous, healthy and vital judiciary, avoid the difficult decision in determining whether judges are incompetent after a certain age, increase the opportunity for younger persons to serve in the judiciary, and assure predictability and ease in administering judges' pension plans. App. B at A-24 - A-25.

3. Proceedings In The Court of Appeals. The Eighth Circuit affirmed the district court's dismissal of petitioner's complaint. App. A at A-3. Petitioners had appealed the dismissal of their ADEA claim on the ground that judges are not "appointee[s] on the policymaking level."[1] In affirming, the Eighth Circuit agreed that appointed judges are exempted from the ADEA's definition of "employee" as "appointee[s] on the policymaking level" within the meaning of section 630(f). In reaching this conclusion Judge Bowman, writing for the panel, stated that judges occasionally resolve unsettled issues and thus "create law," as well as "exercise considerable policymaking respon-

[1] Governor Ashcroft did not cross-appeal the district court's ruling that appointed state court judges are not subject to the "elected to public office" exemption under section 630(f). The governor had argued unsucessfully in the district court that the "elected to public office" exemption was applicable to appointed judges that are subsequently retained in office by a vote of the electorate.

sibility in the supervision of the Missouri court system." App. A at A-6 - A-8.

In affirming the district court's dismissal of petitioners' constitutional claim, the Eighth Circuit agreed that the bases for the Mandatory Retirement Provision, as expressed by the Missouri Supreme Court in *O'Neil v. Baine,* were indeed rational. App. A at A-14 - A-16. Petitioners had argued that the Mandatory Retirement Provision was constitutionally deficient under *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), because the state was relying "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Brief for the Appellants at 16-17 (quoting *Cleburne,* 473 U.S. at 446). Although the Eighth Circuit acknowledged that "[o]ne might disagree with some or all of these rationales," it nevertheless held that the Mandatory Retirement Provision had a rational basis sufficient to withstand constitutional scrutiny. App. A at A-16. Significantly, the Eighth Circuit did not examine the supposedly rational bases for the Mandatory Retirement Provision to see if they were in *fact* rational as applied. App. A at A-14 - A-16.

REASONS FOR GRANTING THE WRIT

In conflict with the decisions of this Court and another court of appeals, as well as the statutory language of the ADEA, the court of appeals in this case incorrectly decided questions of great importance to the administration of justice throughout the state court systems of this nation. By addressing whether any state can impose an arbitrary upper limit on the age of its judges, the questions presented in this case have potentially dramatic effects upon the composition of state courts throughout the nation. Subsumed within the questions presented are conflicting issues of federalism — the ADEA's expressed federal policy against age discrimination by all employers, including the fifty states, as compared with the right of the states to regulate the means and form of their governments, including their judiciaries.

A. The Conflict Among The Circuits Requires Resolution By This Court Of Whether An Appointed State Court Judge Is An "Appointee On The Policymaking Level" Within The Meaning Of The Age Discrimination In Employment Act ("ADEA") And Therefore Exempted From The ADEA's General Prohibition Of Mandatory Retirement And Thus Subject To Mandatory Retirement Under Various Provisions Of State Constitutions.

In conflict with the prohibitions of the ADEA, and based on an erroneous interpretation of that Act's exemptions, the Eighth Circuit upheld the State of Missouri's discrimination against appointed state court judges on the basis of age. This decision is in direct conflict with a recent Second Circuit case, *EEOC v. Vermont,* No. 89-6178 (2d Cir. May 21, 1990).

In pertinent part the statutory provision at issue provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or

> political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f).

In holding that appointed state court judges are exempted from the ADEA's protections as "appointee[s] on the policymaking level" under 29 U.S.C. §630(f), the Eighth Circuit aligned itself with the First Circuit's decision in *EEOC v. Massachusetts,* 858 F.2d 52 (1st Cir. 1988). In reaching this conclusion, both courts agreed that "policymaking" includes conduct that is very similar to that encompased by phrases like "exercise of discretion" and "exercise of judgment" — terms that frequently are used to describe performance by judges. App. A at A-6; *EEOC v. Massachusetts,* 858 F.2d at 55. The Eighth Circuit took the view that judges are policymakers because they "resolve issues previously unsettled and thus . . . create law." App. A at A-6 - A-7. The Eighth Circuit also found that Missouri's appointed judges "exercise considerable policymaking responsibility in the supervision of the Missouri court system." App. A at A-7.

In direct conflict with these holdings, the Second Circuit, Judge Kearse writing for the court, concluded that "the performance of traditional judicial functions is not policymaking." *EEOC v. Vermont,* No. 89-6178, slip op. at 15 (2d Cir. May 21, 1990). Continuing this line of analysis, that court stated:

> The principal business of the courts is the resolution of disputes. In some cases, the courts resolve those disputes merely by applying established legal principles; in others, they must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled. Even in the latter type of case, however, the courts are called upon primarily

to fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy.

Id.

Both the First Circuit in *EEOC v. Massachusetts* and the Eighth Circuit in this case reasoned that Congress must have intended to exempt appointed state court judges from the definition of "employee" in section 630(f) of the ADEA, because it would be "nonsensical" to have appointed judges protected under the ADEA while elected judges were not. App. A at A-11; 858 F.2d at 57. Both courts also approved as nondiscriminatory a state's desire to avoid the difficult task of evaluating the individual performance of its older judges on the merits by imposing a mandatory retirement age. App. A. at A-15; 858 F.2d at 57.

The Second Circuit expressed sharp disagreement with these conclusions. *EEOC v. Vermont,* No. 89-6178 (2d Cir. May 21, 1990). First, the Second Circuit noted that Congress could easily have exempted judges (if it intended to do so) by specifically including them in the statutory exemption from the definition of "employee." *Id.*, slip op. at 18. Second, Judge Kearse narrowly construed the section 630(f) exemption of an "appointee on the policymaking level" from the definition of "employee"; the court instead limited the exemption to elected officials and a narrowly defined group of appointees that worked closely with the appointing authority but which did not include judges. *Id.*, slip op. at 6-18. Third, addressing the Eighth and First Circuits' position that it was "nonsensical" for Congress to differentiate between appointed and elected judges, the Second Circuit quite properly noted that "[a]ny perceived imprudence in this dichotomy is a matter to be addressed to Congress." *Id.*, slip op. at 18.

Highlighting the conflict between the circuits is the Eighth and First Circuit position that it is reasonable for a state to

avoid the "perilous task of evaluating the performance of its older judges." *EEOC v. Massachusetts,* 858 F.2d at 57. *See* App. A at A-15. The Second Circuit quite correctly attacked this position because of its contravention of the purpose of the ADEA: "Congress enacted the ADEA precisely in order to permit older employees to be evaluated on their merits rather than simply on the basis of age." *EEOC v. Vermont,* slip op. at 18. Thus, as the Second Circuit noted, to the extent that Missouri and Massachusetts support their mandatory retirement scheme, as a means of avoiding the evaluation of the abilities of their older judges of sometimes failing competence by substituting an arbitrary determination on the basis of age, those states' policies directly conflict with the policy determination made by Congress in its enactment of the ADEA. *Id.*

By its context the pertinent statutory language of the policymaking exemption, *supra* at 8-9, supports the Second Circuit's construction of "appointee on the policymaking level" — one that limits "policymakers" to persons on an elected official's staff or who work closely with the elected official in the manner of cabinet officials. *EEOC v. Vermont,* slip op. at 14. "[A]ppointee on the policymaking level" is sandwiched between two other exemptions, both of which specifically limit the exemption to persons working closely with the elected official. 29 U.S.C. §630(f). This militates against the Eighth Circuit's construction, because the policymaking exemption should be construed narrowly. *See* Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2179, 2180; *EEOC v. Bd. of Trustees,* 723 F.2d 509, 510 (6th Cir. 1983).[2] Thus, rather than include policymakers anywhere

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[2] The ADEA exemption for "appointee[s] on the policymaking level" is identical to its Title VII counterpart, *cf.* 42 U.S.C. § 2000e(f), and thus relevant portions of Title VII's legislative history and judicial construction apply to their counterparts in the ADEA. *See, e.g., Lorillard v. Pons,* 434 U.S. 575, 584 (1978).

in state or local government as exempted persons, the appropriate construction of the exemption is the Second Circuit's more narrow version.

As the foregoing summary demonstrates, the lower courts are in need of guidance on the proper interpretation of section 630(f) with respect to whether appointed state court judges are "appointee[s] on the policymaking level." The Eighth Circuit's opinion in this case presents a clear, unambiguous holding in conflict with the Second Circuit and Congressional intent as expressed by the statute's plain language and the legislative history. This Court should therefore resolve this conflict by granting certiorari with respect to the first question presented.

B. In Conflict With This Court's Precedents, The Eighth Circuit Wrongly Construed Article V, Section 26 Of The Missouri Constitution, Which Provides For The Mandatory Retirement Of Missouri State Court Judges Who Attain The Age Of Seventy, As Having A Rational Basis And Not Violating The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution.

In affirming the district court's dismissal of petitioners' equal protection claim, the Eighth Circuit relied primarily upon four reasons that purportedly provide a rational basis for Missouri's Mandatory Retirement Provision. App. A at A-15. As legitimate reasons for the Mandatory Retirement Provision, the Eighth Circuit identified Missouri's interest in (1) "maintaining a highly qualified and vigorous state judiciary," allegedly obtained by drawing a line "at an age at which there is often a lessening in mental and physical abilities"; (2) avoiding the difficult determination of whether a judge is physically or mentally qualified; (3) increasing opportunities for younger lawyers; and (4) "ease in establishing and administering judges' pension plans." App. A at A-15.

The Eighth Circuit's reliance upon these bald assertions contravenes the teachings of this Court's rational basis analysis. The classification at issue in this case is age, and this Court has previously held that age is not a suspect class. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). Nevertheless, this Court has included the aged with the disabled, the mentally ill and the infirm, as groups which have "immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Cleburne*, 473 U.S. at 445-46. Accordingly, while heightened scrutiny would be inappropriate, the aged are still entitled to meaningful and considered review under the rational basis standard: "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

The Eighth Circuit concluded that Missouri's Mandatory Retirement Provision for judges who have reached the age of seventy withstands the rational basis test, *i.e.*, the distinction between judges over and under the age of seventy is rationally related to legitimate governmental purposes. App. A at A-16. Measuring the four purposes previously identified as rational bases for the Mandatory Retirement Provision, *supra* at 12, against the standard identified in *Murgia* and *Cleburne*, the Eighth Circuit decision cannot stand.

In *Cleburne* this Court struck down as arbitrary and irrational a zoning classification that singled out the mentally retarded, because the purposes allegedly supporting that classification were equally applicable to other groups that were not subjected to the same limitation. 473 U.S. at 447-48. In *Cleburne* a group home for the mentally retarded was required to obtain a special use permit when other permitted uses such as apartment houses, fraternity houses, dormitories, hospitals and nursing homes were not. *Id.* This Court concluded that the

distinction was not constitutionally permissible because the record did not reveal any rational basis for believing that the group home for the mentally retarded posed any special threat to the city's legitimate interests in a way that other permitted uses like boarding houses and hospitals would not. *Id.* at 448.

Three of the four principal criteria relied upon by the Eighth Circuit as rational bases for Missouri's Mandatory Retirement Provision are equally infirm under *Cleburne*. The tedious, difficult and potentially embarrassing task of determining which judges are not physically and mentally qualified is no more onerous than the task of identifying which of any other state employees in non-physically demanding jobs are not mentally or physically qualified. Likewise, the provision of increased opportunities for the young results equally from the imposition of a mandatory retirement age in all state employment opportunities. Finally, the ease gained in establishing and administering judges' pension plans by having a mandatory retirement age is no greater than would be gained in any other pension plans administered by the State of Missouri. Missouri's state court judges do not threaten, to a greater extent than any other group of state employees, Missouri's interest in (1) avoiding difficult employee evaluations; (2) providing new employment opportunities for the young; and (3) administering state pension plans with ease. Accordingly, under *Cleburne* these three supposedly rational bases for Missouri's Mandatory Retirement Provision are irrational and violate the Equal Protection Clause of the Fourteenth Amendment. 473 U.S. at 448.

The remaining purpose relied upon by the Eighth Circuit as a rational basis for Missouri's Mandatory Retirement Provision is Missouri's interest "in maintaining a highly qualified and vigorous state judiciary" by drawing "a line at an age at which there is often a lessening in mental and physical abilities." App. A at A-15. This objective is nearly identical to the objective of the State of Massachusetts in the *Murgia* case, i.e., the "physical preparedness" of the police. *See Murgia,* 427 U.S. at

314-15. This Court there upheld the rationality of an age fifty mandatory retirement date for state policemen. *Id.* at 314. In that case, however, an extensive factual record was developed in the district court. *Id.* at 310. This Court upheld the mandatory retirement age, but with the qualification that there "is no indication that [the mandatory retirement statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." *Id.* at 315-16.

Like *Murgia,* there is no indication in this case that the age seventy retirement date for Missouri's state court judges has the effect of excluding from service a significant percentage of judges who are unqualified. Unlike *Murgia,* petitioners were not allowed to present their evidence in court — evidence which they assert would show that Missouri's selection of an age seventy retirement date excludes so few "unqualified" judges that it cannot be rationally related to the goal of insuring a vital, vigorous and healthy judiciary. Given this failure of proof, the remaining ground upon which the Eighth Circuit relied in finding a rational basis is wholly arbitrary and capricious.

Thus, the Eighth Circuit's rational basis analysis is fatally flawed and violates the precedents of this Court's equal protection law. It should be reviewed and corrected by this Court.

CONCLUSION

In summary, this case presents the opportunity to establish clear guidelines for the lower courts on the proper interpretation of the term "appointee on the policymaking level" in 29 U.S.C. § 630(f). The Eighth and First Circuit's interpretations of this provision conflict with that of the Second Circuit, as well as the statutory language and legislative history. The Eighth Circuit's overbroad construction of the ADEA's exemptions from the definition of "employee" threatens to vitiate the ADEA's applicability to the states in a manner far beyond what Congress intended.

Furthermore, the Eighth Circuit's affirmation of the dismissal of petitioners' equal protection claim raises significant constitutional implications. If it is allowed to stand, any state may force any employee to retire at any age without (1) any showing that those forced retirements meet any significant state purpose and (2) without any showing of why the retirement age is not equally applicable to the state's other employment classifications.

For the reasons stated in this petition, petitioners respectfully request that this Court grant the petition for writ of certiorari.

DATED this 3rd day of July, 1990.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 89-2360

Honorable Ellis Gregory, Jr.;
Honorable Anthony P. Nugent, Jr.;
Honorable Douglas W. Greene and
Honorable Flake L. McHaney,
Appellants,

v.

Honorable John D. Ashcroft,
Appellee.

Submitted Nov. 17, 1989

Decided March 5, 1990

Reported at 898 F.2d 598

Jim J. Shoemake, St. Louis, Mo., Samuel Marcosson, amicus curiae, Washington, D.C., for appellants.

Michael L. Boicourt, Jefferson City, Mo., for appellee.

Before BOWMAN and BEAM, Circuit Judges, and ROSS, Senior Circuit Judge.

BOWMAN, Circuit Judge.

Four Missouri state court judges challenge the provision of the Missouri Constitution that mandates their retirement at age 70. Mo. Const. art. V, § 26(1) (1945 as amended 1976) ("mandatory retirement provision"). Judges Ellis Gregory, Jr., Anthony P. Nugent, Jr., and Douglas W. Greene, argue that the mandatory retirement provision violates the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1982 & Supp.1987). These judges along with Judge

Flake L. McHaney further argue that the mandatory retirement provision violates the equal protection clause of the Fourteenth Amendment.

Judges Gregory, Nugent, and Greene were initially appointed and have been retained as judges pursuant to the Missouri Non-Partisan Court Plan ("Missouri Plan"). Mo. Const. art. V, § 25. Under the Missouri Plan, the Governor (selecting from candidates recommended by merit screening commissions) appoints judges to the state supreme court, to the state intermediate appellate court, and to the state circuit courts within Jackson County (which encompasses Kansas City) and the city of St. Louis. At the end of his appointed term, each judge must place his name on the ballot in the next general election if he wishes to be retained for another term. If a majority of the voters vote in favor of retaining the judge in office, he serves another full term on the bench. At the end of that term, the judge again may place his name on the ballot and be retained for yet another full term; except for the mandatory retirement provision, there is no limit on the number of terms a judge may achieve through this ballot-retention method. The judges selected according to the Missouri Plan argue that they are "employees" entitled to the protection of the ADEA because they are neither "elected to public office" nor "appointee[s] on the policymaking level." *See* 29 U.S.C. § 630(f).[1]

The District Court[2] granted Governor John D. Ashcroft's motion to dismiss after determining that Judges Gregory, Nugent, and Greene were excluded from the ADEA definition

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[1] The parties do not dispute that Judge McHaney, elected to office in a traditional partisan election, does not fall within the coverage of the ADEA. *See* 29 U.S.C. § 630(f) ("term 'employee' shall not include any person elected to public office . . .").

[2] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

of "employee" because they are "appointee[s] on the policymaking level," 29 U.S.C. § 630(f), and that the mandatory retirement provision does not violate the Fourteenth Amendment because there is a rational basis for this provision. The judges appeal. We affirm.

I.

The statutory claim of Judges Gregory, Nugent, and Greene arises out of an asserted conflict between the ADEA, 29 U.S.C. § 621-634, and the provision of the Missouri Constitution that requires judges to retire upon reaching the age of 70. Subject to several exceptions discussed below, the ADEA prohibits an employer from discriminating on the basis of age in making virtually any employment decision regarding an employee who is 40 or more years of age. 29 U.S.C. §§ 623, 631. In 1976, when the mandatory retirement provision was added to the Missouri constitution, it was unaffected by the ADEA, which at that time applied only to employees between the ages of 40 and 65. In 1978, Congress raised the age limit of 65 to 70, and in 1986 (effective January 1, 1987), it eliminated the upper age limit and amended the ADEA to cover all employees having reached the age of 40. *See* 29 U.S.C. § 631(a).

It is undisputed that if the definition of "employee" contained in the ADEA extends to Judges Gregory, Nugent, and Greene, the application to them of the mandatory retirement provision would be a violation of the Act. Under the supremacy clause of the United States Constitution, a conflict between a constitutionally valid federal law and state law must be resolved in favor of the federal law. *See* U.S. Const. art. VI, cl. 2. Thus, "to the extent that the [ADEA] conflict[s] with existing state mandatory retirement statutes, the Supremacy Clause dictates that federal law prevail." *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 752 (7th Cir.), *cert. denied*, 464 U.S. 992, 104 S.Ct. 484, 78 L.Ed.2d 680 (1983). For supremacy clause purposes, it makes no difference that here the mandatory retirement provision is found in the state constitution rather than in a

state statute. Because, however, the tenure of state judges is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate, we will examine the ADEA to determine whether Congress explicitly and unequivocally manifested its intent to preempt state law in this area. *See United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). We do not think Congress would have passed legislation that so significantly intrudes on a state's power to regulate its judiciary without giving serious consideration to the consequences of the legislation, its implications for our federal system, and the question of its constitutional basis. We therefore will not interpret the ADEA as conflicting with the Missouri Constitution unless we find that Congress clearly has expressed its intention to bring state judges into the ambit of the federal statute. *Accord EEOC v. Massachusetts,* 858 F.2d 52, 54 (1st Cir.1988).

[1] We now turn to the language of the statute. The central issue is whether the "except" clause in the ADEA definition of "employee" applies to appointed state court judges and thereby excludes them from the protection of the Act.

> The term "employee" means an individual employed by any employer *except that* the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policymaking level* or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (emphasis added).

As a preliminary matter, we note that the District Court found Judges Gregory, Nugent, and Greene, initially appointed

by the Governor and retained in office by a majority of the voters as required by the Missouri Plan, to be outside the ADEA's exception for persons "elected to public office". Although we are inclined to disagree with this aspect of the District Court's decision, the Governor did not cross-appeal this issue, it was not briefed by either side, and it is not properly before us. We therefore express no opinion on this point, and shall assume for the balance of this opinion that state judges selected according to the Missouri Plan are appointed and not "elected" within the meaning of the ADEA.[3]

It follows that our task is to determine whether appointed state judges are "appointee[s] on the policymaking level." A handful of federal and state courts have addressed this issue. *See EEOC v. Massachusetts,* 858 F.2d 52 (1st Cir.), *aff'g* 680 F.Supp. 455 (D.Mass.1988); *EEOC v. Illinois,* 721 F.Supp. 156 (N.D.Ill.1989); *EEOC v. Vermont,* 717 F.Supp. 261 (D.Vt.1989); *Schlitz v. Virginia,* 681 F.Supp. 330 (E.D.Va.), *rev'd on other grounds,* 854 F.2d 43 (4th Cir.1988); *In re Stout,* 521 Pa. 571, 559 A.2d 489 (1989); *Apkin v. Treasurer and Receiver Gen.,* 401 Mass. 427, 517 N.E.2d 141 (1988). Of these, only in *Vermont,* 717 F.Supp. at 264, and *Schlitz,* 681 F.Supp. at 334, has it been held that state judges are not "appointee[s] on the policymaking level." The other four cases all reach the opposite conclusion, and thus hold that appointed state judges are not within the purview of the ADEA.

Appellants urge us to adopt the reasoning and holding of the district courts in *Vermont* and *Schlitz.* They argue that a literal reading of the "policymaking level" exception supports their

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[3] Interestingly, the EEOC has taken the position that a state judge "who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.' " EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, *reprinted in* EEOC Compliance Man. (BNA) at N:1001, n. 2.

position because the principal function of a judge is not to make policy, but rather to "decide cases between litigants involving questions of law in which there are no interstices or lacunae to fill." *Vermont,* 717 F.Supp. at 265; Appellant's Brief at 10. We recognize that this view of the role of the judge is not without its adherents. Although it may accurately describe the judge's role in the easy cases, we cannot agree that it does so across the broad spectrum of cases with which judges must deal. The reality of judging is that it is not always—and perhaps not even usually—merely a matter of mechanically applying settled, unambiguous principles of law to specific fact patterns as they arise. We therefore are attracted to the view taken by the First Circuit:

> "[P]olicymaking" is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents.... Moreover, the substantive interest identified by the phrase "on the policymaking level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those persons within the judicial branch who serve as judges. . . .

EEOC v. Massachusetts, 858 F.2d 52, 55 (1st Cir.1988) (*quoting EEOC v. Massachusetts,* 680 F.Supp. at 462 (D.Mass.1988)). In keeping with our common law tradition, judges in deciding the particular cases before them may establish either general standards or specific rules of decision that may be relied upon in the future by other judges, by other branches of government, by attorneys and other professionals in advising their clients, and by members of the public in planning their affairs either individually or in organizations of every kind. Whatever the judicial philosophy of the particular judge, and whether he views his proper role as broad or narrow, his decisions—some of them, at least—necessarily will resolve issues previously unsettled and

thus will create law.[4] Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges must exercise the same sort of discretion in decisionmaking, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policymaking level" in the executive and legislative branches.

Futhermore, many of Missouri's appointed judges exercise considerable policymaking responsibility in the supervision of the Missouri court system. The three levels of the Missouri courts are administered by the Chief Justice of the Supreme Court, the Chief Judges of the various divisions of the court of appeals, and the Presiding Judges in the circuit courts, each having general supervisory powers. Mo. Const. art. V, § 4. The Missouri Supreme Court is responsible for adopting the rules governing the professional conduct of the Missouri judiciary and the Missouri Bar. Moreover, the Missouri Supreme Court is responsible for resolving disputes within the judicial hierarchy. *See In re Rules of Circuit Court for Twenty-First Judicial Circuit,* 702 S.W.2d 457 (Mo.1985) (en banc) (after Twenty-First Judicial Circuit split into factions and was unable to adopt court rules, Supreme Court stepped in and suspended constitu-

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[4] The decisions of the Missouri Supreme Court establish common law for the entire state. *See, e.g., Gustafson v. Benda,* 661 S.W.2d 11 (Mo. 1983) (en banc) (Court rejects previously established tort doctrine of last clear chance and adopts system of comparative negligence as contained in Uniform Comparative Fault Act §§ 1-6 (1983)). Moreover, decisions made in the state courts sometimes involve close and difficult questions of law that have far-reaching ethical, moral, and public policy implications. *See, e.g., Cruzan v. Harmon,* 760 S.W.2d 408 (Mo.1988) (en banc) (holding that parents or other legal guardians lack authority to require that food and water be withheld from comatose daughter who has no cognitive brain function but is neither dead nor terminally ill), *cert. granted,* ___ U.S. ___, 109 S.Ct. 3240, 106 L.Ed.2d 587 (1989).

tional provision allowing associate circuit judges to participate in election of presiding judge); *In re Rules of Circuit Court of Twenty-First Judicial Circuit,* 757 S.W.2d 590 (Mo.1988) (en banc) (after significant headway was made in the implementation of administrative court rules in the circuit, privilege of voting for presiding judge was restored to associate circuit judges). The considerable supervisory power exercised by the justices of the Supreme Court, and to a lesser extent by the court of appeals and circuit court judges, further demonstrates that Missouri judges perform important policymaking functions.

Appellants claim that the context of the exception for an "appointee on the policymaking level", placed as it is within a series of exemptions which apply primarily to the executive and legislative branches of government, indicates that it applies exclusively to appointees within these two branches of government and not to appointees within the judiciary. Appellant's Brief at 11-12. We do not agree. If the policymaking level exception is read in this limited manner, none of the four categories of exemptions from the coverage of the ADEA would apply to employees in the judicial branch in those states where judges are appointed. We believe it is highly unlikely that Congress intended this result, and the implausibility of the total exclusion of the appointed members of the state judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, weighs heavily against such a narrow reading of the policymaking level exception. *See EEOC v. Massachusetts,* 680 F.Supp. at 460-61.

Appellants base their argument in part on legislative history of the exemptions set forth in section 630(f) of the ADEA:

> [i]t is the intention of the conferees to exempt elected officials and members of their personal staff, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly.

Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Admin.News 2179-2180. Relying on this snippet of legislative history (which we are not inclined to assign a great deal of weight, since the only reliable guide to legislative intent is the language and structure of the statute itself), appellants argue that the state courts cannot be considered agencies of state or local government. *See* Appellant's Brief at 13. We disagree. It seems to us far more realistic to view the state judiciary as one of the more powerful "agencies" of state government. The term "government" in this country traditionally has implied the tripartite of the executive, legislative, and judicial branches. We are not persuaded that the language quoted above indicates that Congress clearly intended the "appointee on the policymaking level" exemption in Section 630(f) to apply only to individuals in the executive and the legislative branches. In our view, this legislative history proves little. If anything, it suggests that the conferees simply were not thinking about state judges when they adopted the short statement upon which appellants rely.

If we were to read the "appointee on the policymaking level" exemption as appellants urge us to, we would be left with the anomalous result that low-level employees in the executive and legislative branches would be excluded from the ADEA's coverage if they were on the personal staff of an elected official, while the highest ranking officials in the judicial branch—the judges (but only when appointed rather than elected)—were included within the ADEA's umbrella. As another court noted:

> the resulting line between those who are and those who are not "employees" would be not merely a somewhat waver-

> ing line because of the different characteristics and different sets of interests identified by the four different categories in the "except" clause but, more strikingly, a line jumping sharply up or down as to levels of authority and levels of discretionary performance, depending on whether one served in an elective office (in which case even lower tier officers would be excepted, in all three branches of government) or an appointive office (in which case persons serving in discretionary or advisory positions would be covered in the judicial branch and excepted in the other two branches).

EEOC v. Massachusetts, 680 F.Supp. at 462. Thus an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed. We conclude that Congress's designation of "appointee[s] on the policymaking level" as an exemption to the ADEA definition of "employee" manifests an interest in excluding persons entrusted with extensive decisionmaking authority and discretionary power from the protection of the Act. There is no rational basis for deeming this interest to be more compelling in the executive and legislative branches than in the judiciary, and we refuse to embrace such an inconsistent position. *Accord EEOC v. Illinois,* 721 F.Supp. at 159 ("Absent an express Congressional intent to limit the exception to the legislative and executive branch, a rational reading must include high ranking state officials in all three branches.").

In Missouri, where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA as "appointee[s] on the policymaking level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected

judges for purposes of the ADEA.[5] *EEOC v. Massachusetts,* 858 F.2d at 57 ("The distinction between elected and appointed state judges, which the appellant would have us draw, is nonsensical in terms of furthering the balancing intended by Congress."). Significantly, were we to hold that appointed judges are included within the coverage of the ADEA, it would create an incentive for Missouri to abolish the Missouri Plan and return to selecting all its judges through a purely elective process. Appellants' "proposed reading of the statute would introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have state judges appointed." *EEOC v. Massachusetts,* 680 F.Supp. at 461. Absent a clear expression of Congressional intent to cause this result, we decline to read the exemptions to the ADEA in such a manner.

Finally, appellants argue that this Court's decision in *Stillians v. Iowa,* 843 F.2d 276 (8th Cir.1988), requires us to find that appointed state court judges are not "appointee[s] on the policymaking level." In *Stillians,* we articulated three factors relevant to the determination whether an employee was an "appointee on the policymaking level": "(1) whether the [appointee] has discretionary, rather than solely administrative powers, (2) whether the [appointee] serves at the pleasure of the appointing authority, and (3) whether the [appointee] formulates policy." *Id.* at 278-79 (citations omitted). A judge appointed under the Missouri Plan clearly does not serve at the

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[5] The EEOC argues that states which elect their judges have decided to make them policymakers, responsive to the voters, while states with an appointed bench have chosen to "insulate[] [it] from the political process to which those who make governmental policy are subjected." Brief for EEOC as *amicus curiae* at 9. This argument is unconvincing. The powers and responsibilities of appointed and elected judges are identical and it is these powers and responsibilities that determine whether a judge is on the "policymaking level."

pleasure of the governor who appoints him, and appellants contend that this is dispositive of the question whether they are policymakers for the purposes of the ADEA. We must remember, however, that the sole issue in *Stillians* was whether the program director of the Iowa Arts Council was an "appointee on the policymaking level." (We held that he was.) The application of the policymaking level exception to appointed state judges is a question of first impression for this Court. We do not believe that the list of factors in *Stillians* was intended to be exhaustive or necessarily applicable in all respects to every kind of appointed official. In addition, we stated in *Stillians* that the purpose of the policymaking level exception was to give "[s]tate governors ... broad discretion to fill policymaking positions without fear of being sued by disappointed office seekers." *Id.* at 279. This concern is at least as important in the instant case as it was in *Stillians*. The Governor of Missouri must have the freedom to appoint as judges the persons he feels are best qualified without fear of subjecting himself to age discrimination claims. Moreover, the second factor in *Stillians* reasonably can be read as applying to judges appointed under the Missouri Plan. Following the Governor's appointment of a judge, he serves at the pleasure of the people as a majority of the voters must vote in favor of retaining him if he is to serve another term on the bench. Once the judge's initial term of office is at an end, the voters become, in a very real sense, the appointing authority, for it is they who decide whether or not he continues in office, and he thus serves at their pleasure.

For the reasons stated above, we hold that judges appointed under the Missouri Plan are excluded from the coverage of the ADEA because they are "appointee[s] on the policymaking level" within the meaning of 29 U.S.C. § 630(f).

II.

[2] All four of the judges contend that the Missouri mandatory retirement provision for state court judges violates the

equal protection clause of the Fourteenth Amendment.[6] We do not agree and note that we are unable to find even a single case wherein a state mandatory retirement provision has been invalidated under the Fourteenth Amendment.

Appellants concede that because legislation addressed toward persons over the age of 70 is not subject to heightened scrutiny for constitutional infirmity, our review of the Missouri mandatory retirement provision is confined to determining whether it rationally furthers a legitimate state purpose. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312-13, 96 S.Ct. 2562, 2566-67, 49 L.Ed.2d 520 (1976) (per curiam). Appellants argue, however, that after *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the rational-basis test is no longer as highly deferential to the state as it formerly was, and the state should be held to a strict standard of proof when attempting to establish the rational basis for a state law that has been challenged on equal protection grounds. Because the District Court dismissed their claims without an evidentiary hearing, appellants claim that the state has not met its burden and no rational basis for the mandatory retirement provision has been shown.

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[6] Appellants also claim that the mandatory retirement provision violates the due process clause. We take this to be a substantive due process claim. Appellants have not articulated, however, what fundamental right Missouri's mandatory retirement provision denies them and we therefore will not address this issue. If they are claiming a fundamental right to retain their judgeships after age 70, we categorically reject the notion that the Constitution provides any such right. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (per curiam) ("This Court's decisions give no support to the proposition that a right of governmental employment *per se* is fundamental."); *see also San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 35, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973) (holding that the right to an education is not a fundamental right guaranteed by the Constitution).

Appellants' argument that an evidentiary hearing is required on the rational-basis issue is without merit. In *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), a case decided after *Cleburne,* the record before the Supreme Court consisted of the lower court's judgment on the pleadings; no evidence was produced. The Court held that the ordinance at issue violated neither the due process nor equal protection clauses of the Fourteenth Amendment. *Id.* at 13-14, 108 S.Ct. at 858-859.

> As we stated in *Vance v. Bradley,* 440 U.S. 93, 99 [99 S.Ct. 939, 944, 59 L.Ed.2d 171] (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Id. 485 U.S. at 14, 108 S.Ct. at 859. *Pennell* thus makes it clear that the rational-relationship standard remains a highly deferential standard even after *Cleburne.* And in *Cleburne* itself, the Court stated:

> [t]he lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne, 473 U.S. at 441-42, 105 S.Ct. at 3255-56.

Our task, then, is to determine whether the mandatory retirement provision is a rational method by which Missouri may

serve its legitimate goal of maintaining a highly qualified and vigorous state judiciary. The Missouri Supreme Court considered this issue in *O'Neil v. Baine,* 568 S.W.2d 761 (Mo.1978) (en banc), when it upheld a mandatory retirement provision applicable to state magistrate and probate judges against constitutional challenges. The court articulated a number of rational bases for the mandatory retirement provision including (1) the societal interest in a judicial system of the highest caliber which justifies the drawing of a line at an age at which there is often a lessening in mental and physical abilities; (2) the advantages of an objective line "to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not;" (3) the increase in opportunities to enter the judiciary for qualified younger persons with fresh ideas and techniques; (4) the interest in assuring "predictability and ease in establishing and administering judge's pension plans." *Id.* at 766-67. These rationales are consistent with the conclusions of several other courts. *See, e.g., EEOC v. Massachusetts,* 858 F.2d at 57-58 (it avoids the "perilous task of evaluating the performance of ... older judges", "[t]he forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup"); *Mulmed v. Thornburgh,* 621 F.2d 565, 572 (3d Cir.), *cert. denied,* 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980) (a mandatory retirement provision "eliminates the unpleasantness of selectively removing aged ... judges"); *Trafelet v. Thompson,* 594 F.2d 623, 627, 629 (7th Cir.) (it is rational to treat "judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode," "[m]andatory retirement ... reduces delays in the administration of justice caused by death or disabling illness of sitting judges," the risk of which increases as a judge's age increases), *cert. denied,* 444 U.S. 906, 100 S.Ct. 219, 62 L.Ed.2d 142 (1979); *Apkin,* 517 N.E.2d at 146 ("A line drawn at age seventy eliminates the anguish, time, delay, expense, and em-

barrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process. An age limit on the service of judges also tends to assure that important decisions ... will be made by judges who command respect because they share experiences and understandings similar to those of the majority of adult citizens . . . . [Futhermore, it] makes it possible to increase the proportion of minority group members and women in the judiciary, thereby making the judiciary more representative of society''). One might disagree with some or all of these rationales on either empirical or philosophical grounds and yet be unable properly to conclude that a state which thinks otherwise lacks a rational basis for its mandatory retirement rule for judges.

Because we cannot say that Missouri's mandatory retirement provision for state judges lacks a rational basis, we affirm the District Court's determination that the provision does not violate the equal protection clause of the Fourteenth Amendment.

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-0221C(3)

Hon. Ellis Gregory, Jr., et al.,
Plaintiffs,

v.

John D. Ashcroft,
Defendant.

ORDER

(Entered and Made Public July 14, 1989)

"Age is opportunity no less than youth itself, though in another dress. As the evening twilight fades away, the sky is filled with stars invisible by day." — Unknown.

"I still throw as hard as ever. The ball just doesn't go as fast." Lon Warneke, P. Chicago Cubs, circa 1945.

This matter is before the Court on defendant's motion to dismiss. Plaintiffs oppose the motion. The Court heard oral argument on this motion. After oral argument, the Court stayed these proceedings until March 31, 1989, to give the Equal Employment Opportunity Commission ("EEOC") an opportunity to address administrative charges filed by three of the plaintiffs in December 1988. *See* order dated January 31, 1989. The EEOC proceedings have been closed and the stay has now expired. Accordingly, the Court now considers defendant's pending motion.

Pursuant to this Court's federal question jurisdiction and the Declaratory Judgment Act, 28 U.S.C. §§1331 and 2201, plaintiff state court judges seek declaratory relief with respect to a

Missouri constitutional provision that requires all non-municipal Missouri judges to retire at the age of seventy years. Mo. Const. Art. V, §26(1) (1945, as amended 1976) ("All judges other than municipal judges shall retire at the age of seventy years . . . under a retirement plan provided by law.") Plaintiffs urge this state constitutional provision violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (Count I), as well as the due process and equal protection guarantees of the fourteenth amendment to the federal constitution (Count II). Plaintiff Ellis Gregory, Jr., is sixty-two years old and is an associate circuit judge for the Twenty-First Judicial Circuit of Missouri. Plaintiff Anthony P. Nugent, Jr., is sixty-eight years old and is a judge of the Missouri Court of Appeals, Western District. Plaintiff Douglas W. Greene is sixty-nine years old and is a judge of the Missouri Court of Appeals, Southern District. Plaintiff Flake L. McHaney is sixty-eight years old and is a judge of the Twenty-Fifth Judicial Circuit of Missouri. Defendant John D. Ashcroft is the Governor of the State of Missouri.

The parties do not dispute that plaintiff McHaney is an elected judge, and that plaintiffs Gregory, Nugent, and Greene are subject to the Missouri Non-Partisan Court Plan ("Plan") set forth in Mo. Const. Art. V, §25 (1945, as amended 1976). Pursuant to this Plan, the Governor appoints judges to the state appellate court and to the state circuit courts for St. Louis, Missouri, and Kansas City, Missouri, only. After such appointments, voters periodically determine whether or not each such appointed judge may retain a position on the relevant court.

Defendant moves to dismiss plaintiffs' supplemental complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Defendant argues (1) age is not a protected class and there is a rational basis for requiring judges to retire at the age of seventy, thus plaintiffs are not deprived of their federal constitutional rights; (2) plaintiffs lack standing to

challenge the state's mandatory retirement provision since plaintiffs are not yet seventy years of age; and (3) plaintiffs[1] are not "employees" covered by the ADEA.[2] The court finds defendant's arguments persuasive and will dismiss the complaint with prejudice at plaintiffs' costs.

In general, the ADEA prohibits an employer from discriminating against an employee who has reached the age of forty. 29 U.S.C. §623 and §631. At present, there is no upper age limit beyond which this prohibition does not apply. The ADEA defines an "employee" in relevant part as:

> an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

---

[1] The parties do not dispute that, as an elected judge, plaintiff McHaney does not fall within the ADEA. *See* 29 U.S.C. § 630(f) (under the ADEA, the term " 'employee' shall not include any person elected to public office in any state. . . ."). Nor does plaintiff McHaney pursue the ADEA claim in Count I. Thus, the Court will only address whether plaintiffs Gregory, Nugent, and Greene are "employees" within the meaning of the ADEA.

[2] To the extent defendant also raised the fact plaintiffs had not exhausted their administrative remedies before filing their ADEA claim, that contention is now moot. *See, e.g.*, January 31, 1989, order. Accordingly, the Court will not further address that argument at this time.

29 U.S.C. §630(f). An "employer" includes a state or any political subdivision. 29 U.S.C. §630(b).

The issue now presented to the Court is whether plaintiffs Gregory, Nugent, and Greene may be considered "appointee[s] on the policymaking level" so as to be excluded from ADEA's coverage.[3] Finding persuasive the reasoning of three courts, *Equal Employment Opportunity Commission v. Massachusetts,* 858 F.2d 52 (1st Cir. 1988), *aff'g,* 680 F.Supp. 455 (D. Mass. 1988); *Apkin v. Treasurer and Receiver General,* 517 N.E.2d 141 (Mass. 1988), the answer is yes.

This Court finds that those judges appointed to specified Missouri courts by the Governor pursuant to the Non-Partisan Court Plan, Missouri judges such as plaintiffs Gregory, Nugent, and Greene, are "appointees." Additionally, such judges are "on the policymaking level." As the Hon. Robert E. Keeton stated:

> "policymaking is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents. . . . Moreover, the substantive interest identified by the phrase "on the policymaking level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those persons within the judicial branch who serve as judges. . . .

[3] This Court concurs with plaintiffs that plaintiffs Gregory, Nugent, and Greene, along with similarly situated Missouri state court judges, do not fall within the ADEA's exception for "any person elected *to* public office." 29 U.S.C. §630(f) (emphasis added). Judges selected pursuant to the Non-Partisan Court Plan are appointed to, not elected to, their respective courts. Thus, the Court finds the ADEA's election exception inapplicable here.

E.E.O.C., supra, 680 F.Supp. at 462. In addressing Judge Keeton's quoted language, the First Circuit stated:

> This judicial type of policymaking is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decisionmaking, and the same kind of forward thinking that is required of "appointees on the policymaking level" in those other two branches of government. And it certainly concerns state government to a similar degree.

E.E.O.C., supra, 858 F.2d at 55. The First Circuit further noted

> that Congress did not strictly limit the [ADEA] exception to policymakers, but rather applied it to all those "at the policymaking level." This appears to be a somewhat more flexible standard, which requires us to look at the position of the appointees within the government structure, and not so much at the particular duties of the persons involved.

Id. at 56. On a more practical level, the full Massachusetts Supreme Court remarked that "making a distinction between elected [ADEA expressly inapplicable] and appointed judges [ADEA applicable], would produce a helter-skelter, irrational pattern throughout the country." *Apkin, supra,* 517 N.E.2d at 146.

This determination that a state judge, appointed under the Non-Partisan Court Plan, may be considered an appointee "on the policymaking level" for purposes of the ADEA, does not run afoul of the Eighth Circuit's test for such a position. In *Stillians v. Iowa,* 843 F.2d 276 (8th Cir. 1988), the Eighth Circuit found the following factors relevant to the determination whether a person was an appointee on the policymaking level:

> (1) whether the [appointee] has discretionary, rather than solely administrative powers, . . . (2) whether the [appointee] serves at the pleasure of the appointing authority . . . and (3) whether the [appointee] formulates policy.

Id. at 278-79. Most significantly, that case did not address whether any appointees in the government's judicial branch may be considered to be "on a policymaking level" for purposes of the ADEA's "employee" definition. There is no support for finding that the ADEA's exclusionary language regarding appointees applies only to the non-judicial branches of government. Accordingly, the Court finds the analysis of the First Circuit and of the Massachusetts district court, as set forth in the *E.E.O.C.* opinions, *supra,* determinative of whether an appointed member of the judicial branch falls within the ADEA's exclusionary language.

Nor is the other case on which plaintiffs rely, *Schlitz v. Virginia,* 681 F.Supp. 330 (E.D. Va.), *rev'd on other grounds,* 854 F.2d 43 (4th Cir. 1988), persuasive. The Virginia district court correctly noted the ADEA "neither explicitly includes nor excludes specific types of state judges," but instead distinguishes between "elected and appointed officials," *id.* at 334. The ADEA's employee exception language, however, excludes all officials, whether elected or appointed, who are at "a policymaking level." Thus, it is difficult, if not impossible, to distinguish between elected and appointed state court judges once they are identified, as they have been by this Court, as being "on a policymaking level." Moreover, the fact state court judges "show traditional employee characteristics," *id.* at 333, is not in itself determinative of whether or not the ADEA's exclusions apply. The Act's exclusions cover several positions that "show traditional employee characteristics" which might merit the protection of the ADEA.

Accordingly, after careful consideration, and in light of the reasoning of the First Circuit and Massachusetts courts, the Court will grant defendant's motion to dismiss the ADEA claim in Count I of plaintiffs' supplemental complaint.

The Court further finds the state constitutional provision requiring retirement of state court judges at age seventy does not violate the plaintiffs' federal constitutional rights to due process

and equal protection under the fourteenth amendment. Old age is not a suspect class and there is no fundamental right to government employment *per se. Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (per curiam). Thus, the state's mandatory retirement provision is not reviewed under the strict judicial scrutiny standard. *Id.* Rather, the provision is reviewed to determine whether or not there is a rational basis for the distinction between judges and other state officials or employees to whom no mandatory retirement age applies. *See id.*[4] This test also applies to plaintiffs' due process claim. *Mulmed v. Thornburgh,* 621 F.2d 565, 575-76 (3rd Cir.), *cert. denied,* 449 U.S. 955 (1980).

Under this test, Missouri's mandatory retirement provision for judges withstands plaintiffs' constitutional challenge. The full Missouri Supreme Court upheld a mandatory retirement provision applicable to state magistrate and probate judges

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[4] Plaintiffs urge *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985), "announced an increased, more probing standard of review" for federal equal protection claims in cases such as this. This Court disagrees. In *Cleburne,* the court disapproved of the appellate court's application of a scrutiny stricter than the rational basis standard to a claim that a city ordinance discriminated against the mentally retarded in violation of the equal protection clause. *Id.* at 439-47. In fact, the court stated:

> [t]he lesson of *Murgia* [, *supra,*] is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Id. at 441-42. The fact the Supreme Court in *Cleburne* found that particular ordinance did not withstand the rational basis test does not mean the state constitutional provision in this case similarly violates the equal protection clause.

against constitutional equal protection and due process challenges. *O'Neil v. Baine,* 568 S.W.2d 761 (Mo. 1978) (en banc). In rendering its decision, the state supreme court articulated the bases for such a provision:

> Our citizens are entitled to a judicial system of the highest caliber and to judges with the highest possible mental and physical qualifications. Mandatory judicial retirement is an attempt . . . to insure the fitness of the judiciary as a whole and to insure the continued competency of the system. . . . There are certain ages in life, learned from experience, at which there is a lessening in mental, physical abilities. If mandatory retirement is invalid at age 70, then at what age — 80, 90, or 100? To paraphrase Holmes, — in life, one must make choices. . . . The [provision] draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system. . . . The [provision] is an attempt to insure that, on the whole, only those judges who have the vigor, health and vitality will carry out the public's work in administering justice. The function of mandatory retirement is to permit the withdrawal from the bench that group of judges in which disabilities related to aging are most likely to occur. . . .
>
> Second, the [provision] draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not. A mandatory provision avoids these traumatic and often lengthy hearings.
>
> Third, mandatory retirement increases the opportunity for qualified persons — men and women alike — to share in the judiciary and permits an orderly attrition through retirement. . . .
>
> Such a provision not only achieves the maximum in qualified judicial personnel, but equally important widens the opportunities for qualified younger members of the Bar to seek a judicial post. . . . [A] state might prescribe a mandatory retirement for judges in order to "open up" judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system.
>
> Fourth, such a mandatory provision also assures predictability and ease in establishing and administering judge's pension plans.

Id. at 766-67 (citations and footnote omitted). This articulation is consistent with the conclusions of other courts. *See, e.g., E.E.O.C., supra,* 858 F.2d at 57-58 (it avoids the "perilous task of evaluating the performance of older judges;" "[t]he forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup"); *Malmed, supra,* 621 F.2d at 572 (such a provision "eliminates the unpleasantness of selectively removing aged . . . judges"); *Trafelet v. Thompson,* 594 F.2d 623, 627, 629 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (it is rational to treat "judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode;" "[m]andatory retirement . . . reduces delays in the administration of justice caused by death or disabling illness of sitting judges" which have an increased risk as age increases); *Apkin, supra,* 517 N.E.2d at 146 ("A line drawn at age seventy eliminates the anguish, time, delay, expense, and embarrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process. An age limit on the service of judges also tends to assure that important decisions . . . will be made by judges who command respect because they share experiences and understandings similar to those of the majority of adult citizens. . . . [Furthermore,] it makes it possible to increase the proportion of minority group members and women in the judiciary, thereby making the judiciary more representative of society.").

Accordingly, the Court will grant defendant's motion to dismiss the constitutional claim as set forth in Count II of plaintiffs' supplemental complaint.

After careful consideration,

IT IS HEREBY ORDERED that defendant's motion to dismiss is granted.

IT IS HEREBY FURTHER ORDERED that this action is dismissed with prejudice at plaintiffs' costs.

Dated this 14th day of July, 1989.

/s/ William Hungate
United States District Judge

APPENDIX C

Article V, Section 25(c)(1) of the Missouri Constitution provides:

> Each judge appointed pursuant to the provisions of section 25(a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 25(a)-(g) become applicable to his office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 25(a)-(g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the state if his office is that of judge of the supreme court, or within the geographic jurisdiction limit of the district where he serves if his office is that of a judge of the court of appeals, or within the circuit if his office is that of circuit judge, or within the county if his office is that of associate circuit judge on a separate judicial ballot, without party designation, reading:
>
> "Shall Judge _____
> (Here the name of the judge shall be inserted)
>
> of the _____
> (Here the title of the court shall be inserted)

be retained in office? Yes ____ No ____
(Mark an "X" in the box you prefer.)"

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 25(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR., and ANTHONY P. NUGENT, JR.,
Petitioners,

vs.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Age Discrimination in Employment Act (ADEA) definition of "employee," 29 U.S.C. § 630(f), which exempts "appointee[s] on the policy making level," include under its coverage Missouri state-court judges?

2. Does a state constitutional provision mandating the retirement of its judges at age 70 rationally further a legitimate state purpose?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, John D. Ashcroft, Governor of the State of Missouri, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 898 F.2d 598 (1990), and is reproduced at pages A-1 through A-16 of the Petition.

STATEMENT OF FACTS

As relevant herein, this legal proceeding was initiated by a supplemental and amended complaint filed on behalf of the Honorable Ellis Gregory, Jr., the Honorable Anthony P. Nugent, Jr., the Honorable Douglas W. Greene, and the

Honorable Flake L. McHaney.* The plaintiffs based their claims for relief upon the Age Discrimination in Employment Act of 1967 (hereafter "ADEA"), 29 U.S.C. §§ 621-634, as amended by Public Law 99-592, and upon the Fourteenth Amendment to the United States Constitution. The plaintiffs alleged that Article V, § 26, of the Missouri Constitution, which provides, in part, that "[a]ll judges other than municipal judges shall retire at the age of seventy years . . . under a retirement plan provided by law . . .," is in violation of the ADEA and the Fourteenth Amendment. The retirement provision of the Missouri Constitution is reprinted in the petition at page 3.

The defendant, the Honorable John D. Ashcroft, present Governor of the State of Missouri, moved to dismiss the complaint of plaintiffs. The Governor alleged that the Fourteenth Amendment does not apply to issues of age, or that, in the alternative, that the State of Missouri has a rational basis for requiring judges to retire at the age of seventy, and that plaintiffs failed to state a cause of action under the ADEA because plaintiffs are not employees covered by the ADEA.

In the majority of jurisdictions within the State of Missouri, circuit and associate circuit judges are selected by a vote of the people. The elections are partisan and political. With respect to specified jurisdictions and courts, some judges are appointed by the Governor (Art. V, § 25(a)), with the caveat that people do vote on whether to retain such judges in office (§ 25(c)(1)(2)). Petition, pages 4 and A-27. The constitutional provisions herein referred to constitute what is known as the Missouri Non-Partisan Court Plan (NPCP). Its provisions apply to the appellate courts of the State of Missouri and to the circuit courts in the St. Louis and Kansas City metropolitan areas.

---

* Judges Gregory and Nugent filed the petition for certiorari. Judges Greene and McHaney did not join.

Three of the original plaintiff judges serve as a result of the processes outlined under the Non-Partisan Court Plan. Judge McHaney was initially appointed, and thereafter has been elected and reelected, to serve a district not covered by the NPCP. The petitioners do not allege that judges elected to office by the people are "employee[s]" under the ADEA.

The Missouri Constitution does not disqualify state court judges from acting in a judicial capacity after attaining the age of seventy.

> Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the Supreme Court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge, he shall have the same powers as an active judge.

Art. V., § 26.3, Petition, page 3.

Section 476.682, RSMo Supp. 1988, provides a mechanism whereby persons who serve as judges, pursuant to the constitutional provision cited *supra*, after the age of seventy will receive compensation at the same annual rate as judges under seventy.

Judges covered by the Missouri NPCP are subject to elections. Art. V, § 25(c)(1), Petition, page A-27. After a defined term, such a judge is required to file in the Office of the Secretary of State of Missouri a declaration of candidacy for election to succeed himself if he desires to retain his judicial office. If such a declaration is filed, the question of whether to retain said judge is determined by a majority vote of the people at the next general election.

The EEOC has taken the position that a state judge "who is appointed by the Governor or the legislature and must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.' " EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, reprinted in EEOC

Compliance Man. (BNA) at N:1001, n. 2. The Governor raised this issue in the district court in his motion to dismiss. The district court rejected this argument. Petition, page A-20, f.n. 3. The Eighth Circuit did not reach it. Petition, page A-5.

The parties agree that the State of Missouri is an "employer" within the definition of Title 29 U.S.C. § 630(d).

The district court granted the defendant's motion to dismiss. Petition, pages A-17 to A-26. The lower court dismissed Count I of the plaintiff judges' supplemental complaint (the ADEA count) on the basis that Judges Gregory, Nugent, and Greene were excluded from the ADEA definition of "employee" because they are "appointee[s] on the policy making level." The district court dismissed Count II of the plaintiff judges' supplemental complaint (the Fourteenth Amendment count), because it found that Missouri had a rational basis for the enactment of its constitutional provision respecting the retirement of state court judges, as represented by the Missouri Supreme Court case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978).

The United States Court of Appeals for the Eighth Circuit affirmed. 898 F.2d 598 (8th Cir. 1990), Petition, pages A-1 to A-16. The Eighth Circuit first noted that the tenure of state court judges "is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." Petition, at page A-4. Because the application of the ADEA to state court judges is of such consequence and import, the Eighth Circuit determined that it would not find the ADEA to be in conflict with Missouri's constitutional provision mandating the retirement of state court judges unless it found that "Congress clearly has expressed its intention to bring state court judges into the ambit of the federal statute." Petition, at page A-4. The Eighth Circuit failed to find an intent by Congress to preempt, via the ADEA, state law pertaining to the retirement of judges. To the contrary, the Eighth Circuit found the plain language of 29 U.S.C. § 630(f), which exempts "appointee[s] on

the policy making level," as evidencing a clear-cut congressional intent to exclude state court judges, who do make policy, from the coverage of the Act. Petition, at pages A-6 to A-7. We quote:

> Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges must exercise the same sort of discretion in decision making, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policy making level" in the executive and legislative branches.

The Eighth Circuit did not find applicable legislative history to suggest a contrary result. Petition, at pages A-8 to A-9.

The Eighth Circuit noted that, in Missouri, some state court judges are appointed by the Governor, and subjected to election for retention by the people, and some state court judges are elected by popular vote. The irrationality of treating those judges initially appointed by the Governor as covered, under the ADEA, and treating judges initially elected by popular vote as exempted is obvious.

> In Missouri, where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA as "appointee[s] on the policy making level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected judges for purposes of the ADEA.

Petition, at pages A-10 to A-11. Again:

> Thus an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed.

Petition, at page A-10.

The Eighth Circuit also rejected the petitioners' contention that Missouri's constitutional provision pertaining to the retirement of judges was in violation of the equal protection clause of the Fourteenth Amendment. The Eighth Circuit found that the rational basis test was correctly applied by the district court. Petition, at pages A-13 to A-14. Further, the lower court found that the Missouri Supreme Court had articulated sufficiently rational bases for the mandatory retirement provision in the case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978). Those rational bases include (1) the societal interest in a judicial system of the highest caliber which justifies the drawing of a line at an age at which there is often a lessening in mental and physical abilities; (2) the advantages of an objective line "to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not"; (3) the increase in opportunities to enter the judiciary for qualified younger persons with fresh ideas and techniques; (4) the interest in assuring "predictability and ease in establishing and administering judges' pension plans." Petition, at page A-15. The Eighth Circuit went on to find that the rational bases articulated by the Missouri Supreme Court were consistent with decisions on the same issue from other jurisdictions. In short, the Eighth Circuit found that a state mandatory retirement provision for its judges is not without a rational basis.

REASONS WHY THE PETITION SHOULD BE DENIED

The petitioners posit two reasons why the Court should grant their writ. First, they assert, correctly, that a conflict exists among the circuits on the issue of whether appointed state court judges are exempted from coverage under the ADEA. The court below and the First Circuit found that state court judges, like the petitioners, are "appointee[s] on the policy making level," and thereby exempted under 29 U.S.C. § 630(f). *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988). The Second Circuit found that appointed state court judges are not exempted from coverage under the ADEA. *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990). Second, petitioners assert, incorrectly, that that portion of the opinion below pertaining to the equal protection issue, i.e., whether a state has a rational basis for providing for the retirement of its judges, is in conflict with decisions of this Court.

The respondent submits that this is an inappropriate case in which to grant a writ because (1) despite the existence of a conflict among the circuits, the decisions of the Eighth and First Circuits are correct on the merits and need not be reviewed; (2) there exists an independent basis in support of the opinion of the Eighth Circuit which makes this case unique from other court decisions on the ADEA issue, in that, in Missouri, judges like the petitioners are persons "elected to public office" (29 U.S.C. § 630(f); and (3) there is no conflict in decisions or in principle which justifies a review of the lower court's decision respecting the existence of a rational basis for retiring state court judges.

I.

ALTHOUGH A CONFLICT EXISTS BETWEEN DECISIONS OF THE EIGHTH AND FIRST CIRCUITS AND THE DECISION OF THE SECOND CIRCUIT PERTAINING TO THE EXEMPT STATUS OF APPOINTED STATE COURT JUDGES UNDER THE ADEA, THE WRIT SHOULD BE DENIED IN THIS CASE BECAUSE THE DECISIONS OF THE EIGHTH AND FIRST CIRCUITS ARE CORRECT ON THE MERITS.

The most important issue before the Court relates to the ADEA definition of "employee" set out in 29 U.S.C. § 630(f) (emphasis added):

> The term "employee" means an individual employed by any employer *except that* the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policy making level*, or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Both the Eighth Circuit, to which the petition is directed in this case, and the First Circuit have decided that the exemption language quoted above applies to appointed state court judges, and that, therefore, the proscriptions on age discrimination included within the ADEA are inapplicable. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988). In accord, see *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *In re Stout*, 521 Pa. 571, 559 A.2d 489 (1989); and *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 517 N.E.2d 141 (1988). The decisions of the Eighth and First Circuits are correct, on the merits and as a matter of law, so that Supreme Court review of the positions taken in those cases is unnecessary.

The Eighth Circuit first noted the importance to a state of determining the tenure and qualifications of its judges.

> Because, however, the tenure of state court judges is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate, we will examine the ADEA to determine whether Congress explicitly and unequivocally manifested an intent to preempt state law in this area.

Petition, at page A-4. The Eighth Circuit did not believe that Congress could have intended to preempt the traditional state prerogative with respect to the tenure of its judges without a clear and unequivocal expression of such an intent. The Eighth Circuit then turned to the language of the subject exemption itself, i.e., are appointed state court judges "appointee[s] on the policy making level." That court found that judges are policy makers.

> The reality of judging is that it is not always — and perhaps not even usually — merely a matter of mechanically applying settled, unambiguous principles of law to specific fact patterns as they arise. . . . In keeping with our common law tradition, judges in deciding the particular cases before them may establish either general standards or specific rules of decision that may be relied upon in the future by other judges, by other branches of government, by attorneys and other professionals in advising their clients, and by members of the public in planning their affairs, either individually or in organizations of every kind. Whatever the judicial philosophy of the particular judge, and whether he views his proper role as broad or narrow, his decisions — some of them at least — necessarily will involve issues previously unsettled and thus will create law. Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges

> must exercise the same sort of discretion in decision making, temper their rulings with the same sort of self-restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policy making level" in the executive and legislative branches.

Petition, at pages A-6 to A-7. In addition, the Eighth Circuit found that Missouri's appointed judges exercise policy making responsibility with respect to supervision of the Missouri court system. Petition, at page A-7.

The Eighth Circuit also disposed of the contention that the whole text of 29 U.S.C. § 630(f) suggests an intended application primarily to the executive and legislative branches of government.

> If the policy making level exception is read in this limited manner, none of the four categories of exemptions from the coverage of the ADEA would apply to employees in the judicial branch in those states where judges are appointed. We believe it is highly unlikely that the Congress intended this result, and the implausibility of the total exclusion of the appointed members of the state judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, weighs heavily against such a narrow reading of the policy making level exception.

Petition, at page A-8. The lower court found that such legislative history as is available and pertinent does not suggest a contrary intent of Congress. Petition, at page A-9. The Eighth Circuit also addressed the absurdity of the result proposed by the petitioners.

> Thus, an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA, while the highest ranking judges in Missouri would be covered by the Act simply because they are

> appointed. We conclude that Congress's designation of "appointee[s] on the policy making level" as an exemption to the ADEA definition of "employee" manifests an interest in excluding persons entrusted with extensive decision making authority and discretionary power from the protection of the Act. There is no rational basis for deeming this interest to be more compelling in the executive and legislative branches than in the judiciary, and we refuse to embrace such an inconsistent position. . . .
>
> In Missouri, where the majority of state judges are elected, the irrationality of not excluding appointed judges from the ADEA as "appointee[s] on the policy making level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected judges for purposes of the ADEA.

Petition, at pages A-10 to A-11.

The force and logic of the Eighth Circuit Opinion in this case suggests that this is not the proper case in which to grant a writ to resolve this issue.

The decision of the First Circuit on this issue is equally compelling. We quote:

> If appointed judges fit under any exception, it is the third one: "An appointee on the policy making level." Certainly the judges under consideration are appointees. Just as surely they can be said to be "on the policy making level." While judges have at times been thought to act as somewhat mechanized law-and-fact processors, scientifically applying settled principles of law to established fact patterns, that image hardly meshes with the reality of judging. The trial judge in this case, in fact, provides us with an apt description of the kinds of decisions that members of the bench are called upon to make:

> It is nevertheless clear that "policy making" is indisputably a part of the function of judging to the extent that judging involves law making to fill the interstices of authority found in constitutions, statutes, and precedents (a function more predominant in appellate judging than in the performance of trial judges who are of course the group whose interest plaintiff EEOC seeks to protect in this litigation). Moreover, the substantive interests identified by the phrase "on the policy making level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those judges within the judicial branch who serve as judges (including trial judges).

EEOC v. Commonwealth of Massachusetts, 680 F. Supp. 455, 462 (D. Mass. 1988).

> This judicial type of policy making is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decision making, and the same kind of forward thinking that is required of "apointee[s] on the policy making level" in those other two branches of government. And it certainly concerns state government to a similar degree.

EEOC v. Massachusetts, supra, at 54-55.

It is the decision of the Second Circuit which should be reviewed by this Court. *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990). That circuit concluded that the policy maker exemption applied only to appointees working closely with the elected officials who appointed them. *Id.* at 798. This reasoning disqualifies the judicial branch of government in any state from being exempted under the ADEA. As is true with the federal government, the State of Missouri provides for three independent branches of government, of which the judiciary is a

coequal branch. To perform its function, the judiciary must be independent. That is, a state court judge cannot work closely with the Governor who appointed him if the judiciary is to remain an independent branch of government. Apparently, the Second Circuit believes only bureaucrats make policy. To the contrary, in Missouri, at least, judges are among the most powerful framers of public policy. It is nonsensical to conclude that Congress intended only to exempt executive and legislative policy makers from coverage under the ADEA. Yet more surprising was the conclusion by the Second Circuit that judges are not policy makers!

> Though such a judicial decision may thus state or clarify a policy, any such statement or clarification is merely ancillary to the resolution of a particular controversy between parties.

Id. at 800-801. It is perplexing to understand how a judge can state or clarify policy without making policy. If a writ should be granted to the end that the Supreme Court can review the issue here presented, it is at the Second Circuit to which such a writ should be directed.

II.

THERE EXISTS AN INDEPENDENT BASIS FOR EXEMPTING PETITIONERS FROM COVERAGE UNDER THE ADEA WHICH WOULD MAKE THE GRANTING OF THE WRIT IMPROVIDENT.

Twenty-nine U.S.C. § 630(f) also exempts from the statutory ADEA definition of "employee" "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof . . . ." The district court determined that the "elected to public office" exemption did not apply to judges appointed and retained under the Missouri Non-Partisan Court Plan. Petition, p. A-20, f.n. 3. The Eighth Circuit was inclined to disagree with that conclusion but did not reach it. Petition, p. A-5.

In Missouri, the judges of the state Supreme Court, the state courts of appeals, and the circuit and associate circuit benches in Kansas City and metropolitan St. Louis are initially appointed by the Governor. Art. V, § 25(a), Const. of Mo. (1945); Petition, p. 4. This initial appointment is for a specified term. The judge of a court so specified, who wants to retain his office as a judge, must file in the office of the state Secretary of State "a declaration of candidacy for election to succeed himself." If the declaration is filed, the name of that judge is submitted at the next general election, where eligible voters determine whether or not to retain him. Art. V, § 25(c)(1); Petition, p. A-27.

The EEOC has taken an official position contrary to that reached by the district court in this case. The official position of the Commission is that:

> [A] state or local judge who is elected by the general electorate or who is appointed by the Governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term "employee" under the ADEA as a "person elected to public office."

EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, reprinted in EEOC Compliance Man. (BNA) at N:001, n. 2.

If the petitioners are persons elected to public office, then the question raised in the petition is not dispositive of the existing dispute between the parties and should not be reached. The peculiarities of the Missouri Non-Partisan Court Plan make this case unique among all the decisions relating to the "appointee on the policy making level" issue.

III.

THAT PORTION OF THE EIGHTH CIRCUIT OPINION PERTAINING TO PETITIONER'S EQUAL PROTECTION CHALLENGE OF MISSOURI'S MANDATORY RETIRE MENT PROVISION FOR STATE COURT JUDGES IS NOT IN CONFLICT WITH THE DECISIONS OF THIS OR ANY OTHER COURT.

In their second Question Presented, the petitioners make the total misrepresentation that the equal protection analysis portion of the opinion below is in conflict with this Court's precedents. In fact, as noted by the Eighth Circuit, there is no decision from any court on point which would support the petitioners' position.

> All four of the judges contend that the Missouri mandatory retirement provision for state court judges violates the equal protection clause of the Fourteenth Amendment. We do not agree and note that we are unable to find even a single case wherein a state mandatory retirement provision has been invalidated under the Fourteenth Amendment.

Petition, P. A-13.

Not only is there no conflict in decisions, there is no conflict in principle between the opinion of the Eighth Circuit and existing precedent of this Court. Petitioners cite the Court only to *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Unfortunately for petitioners, *Murgia* held that old age is not a suspect class and there is no fundamental right to government employment. *Id.* at 313. In that case, this Court found specifically that a mandatory retirement age statute for state police officers did not call for a strict scrutiny analysis, i.e., heightened level of analysis should not be applied to state laws

or policies related to age because they do not impermissibly interfere with the exercise of a funadmental right or operate to the peculiar disadvantage of a suspect class.

Cleburne is equally unsupportive of the petitioners' position.

> [T]he lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne, supra, at 441-442.

The petitioners assert that the district court should have given them an evidentiary hearing on the issue of the existence of a rational basis for Missouri's mandatory retirement provision for state court judges. Petition, page 15. However, an evidentiary hearing is not required before the rational basis test may be applied. In *Pennell v. City of San Jose*, 481 U.S. 1 (1988), a case decided after *Cleburne* and *Murgia*, the record before the Supreme Court consisted of a judgment on the pleadings. No evidence was adduced. This Court held that the ordinance at issue violated neither the due process nor equal protection clauses of the Fourteenth Amendment.

> As we stated in *Vance v. Bradley*, 440 U.S. 93, 99 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Id. at 14. The rational basis test is highly deferential to state laws and regulations. That portion of the Eighth Circuit's opinion finding that Missouri had a rational basis for retiring its state court judges at age 70 is not in conflict with any precedent from this Court, nor that of any other court. Therefore, the petition should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. AND ANTHONY P. NUGENT, JR., JUDGES,
Petitioners,

VS.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Although respondent John D. Ashcroft, Governor of the State of Missouri, concedes both the importance of the issue and the conflict among the circuits on the question presented by petitioners with respect to the Age Discrimination in Employment Act's applicability to appointed state court judges, he insists in his Brief In Opposition that this is not an appropriate case for Supreme Court review. For the Reasons set forth in their petition and herein, petitioners, Missouri state court judges Ellis Gregory, Jr. and Anthony P. Nugent, Jr., urge this Court to grant a writ of certiorari.

First, respondent admits the existence of a conflict among the circuit courts of appeal, as well as the importance of the issue. Second, there is no reason to delay addressing the question presented, particularly given the onerous practical effect of such a delay upon effected judges. Third, contrary to respondent's Brief In Opposition, there is no independent basis for affirmance of the judgment below.

Finally, with respect to respondent's Brief In Opposition to the constitutional question presented, *i.e.*, whether the mandatory retirement only of Missouri's state court judges among all its employees in non-physically demanding jobs violates the Equal Protection Clause of the Fourteenth Amendment, petitioners reply that the only case cited by respondent is clearly distinguishable on its facts and does not resolve the conflict between the Eighth Circuit's decision in this case and prior equal protection decisions of this Court.

STATEMENT OF FACTS

Although a judge who is forced to retire under Article V, § 26 of the Missouri Constitution (the "Mandatory Retirement Provision") may be appointed as a senior judge, such appointments are entirely discretionary with the Missouri Supreme Court and are not a matter of right. The enabling statute for the appointment of senior judges provides in pertinent part that "the [Missouri] supreme court *may* appoint a senior judge from the file of approved applications," and that "[a]ppointments to serve shall be based on case load and need, as determined by the supreme court in its discretion, taking into consideration reports filed pursuant to [Mo. Rev. Stat.] § 476.412, recommendations made by the Judicial Resources Commission created herein and such other matters that the Court deems relevant." Mo. Rev. Stat. § 476.681(2) (Cum. Supp. 1989) (emphasis added).

Any Missouri judges who wish to challenge the Mandatory Retirement Provision must do so before their seventieth birthday or risk forfeiting their pension. Upon reaching the age of seventy, any judge who "fails to retire on or before his [or her] seventieth birthday shall automatically waive all such annual compensation, salary and retirement compensation." Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989). The

effect of this forfeiture provision upon the willingness of Missouri state court judges to challenge the validity of the Mandatory Retirement Provision cannot be ascertained from the record; nevertheless, it should be noted that Judges Douglas W. Greene and Flake L. McHaney, plaintiffs below, retired upon reaching age seventy on March 18, 1990 and September 25, 1990, respectively. Neither pursued review in this Court.

Judges selected pursuant to the Missouri Constitutional provisions challenged herein, commonly known as the Missouri Non-Partisan Court Plan, are *appointed* to office. Mo. Const. art. V, § 25(a). Although these appointed judges stand for ***retention*** by a vote of the people, the judges are not opposed, and the question is whether they shall be "retained in office." Mo. Const. art. V, § 25(c)(1).

REASONS FOR GRANTING THE WRIT

I.

RESPONDENT ACKNOWLEDGES THE CONFLICT AMONG THE CIRCUITS AND THE IMPORTANCE OF THE ISSUE

Respondent does not deny the conflict between the Second Circuit and the Eighth and First Circuits. Brief In Opposition at 7. Respondent also acknowledges the importance of the issue by urging grant of a writ of certiorari for the conflicting Second Circuit decision. Brief In Opposition at 12 (citing *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990)). It should be noted that the state of Vermont did not seek to review the Second Circuit decision by petitioning this Court for a writ of certiorari within the time allotted under the Rules of this Court.

II.

THE EIGHTH CIRCUIT DECISION IS WRONG ON THE MERITS

Without rearguing the merits in depth, petitioners submit that appointed judges are not policymakers within the meaning of 29

U.S.C. § 630(f) and therefore not exempted from the ADEA's protection.

In its Brief In Opposition, respondent argues that Congress could not have intended for appointed judges to be "employees" under the Age Discrimination In Employment Act ("the ADEA") because that would lead to the "irrational" result of appointed judges being protected under the ADEA, while elected judges are not so protected. Brief In Opposition at 11 (quoting *Gregory v. Ashcroft*, 898 F.2d 598, 603 (8th Cir. 1990), *reprinted in* Appendix A of the Petition at A-10 to A-11). This seeming anomaly is not a result of a misapplication of the statute or a misunderstanding of Congressional intent; it is the direct result of Missouri's judicial selection system, which curiously enough provides for the appointment of some judges but for the election of others.[1] While it may seem anomalous that an elected Missouri judge and an appointed Missouri judge could be treated differently under the ADEA, the anomaly arises not from any irrationality in petitioners' reading of the statute's plain language, but instead arises from the differing methods for selecting judges under Missouri law.

Rather than re-argue whether judges are "on the policy making level," petitioners urge this Court to grant the writ of certiorari with respect to the first question presented in this case and to follow the reasoning of the Second Circuit in reaching a decision on the merits.

[1] The pertinent Missouri procedures for the selection of judges provide for the *appointment* of all appellate and certain trial judges, while they also provide for the *election* of certain other trial judges in the "out-state" areas.

III.

THE ONEROUS PRACTICAL EFFECT OF THE MANDATORY RETIREMENT PROVISION UPON MISSOURI'S STATE COURT JUDGES PROVIDES ANOTHER REASON FOR THIS COURT TO ACCEPT REVIEW OF THE ISSUE NOW, RATHER THAN DELAYING REVIEW FOR A SUBSEQUENT CASE

Another reason for granting review of the first question presented in this case is to avoid the consequences of delay — primarily upon the lives of effected state court judges in Missouri and throughout the United States, but also upon this Court's workload as an inevitably recurring issue.

Resolution of this issue with respect to Missouri state court judges is particularly important, given the onerous pension forfeiture provision extant in Missouri, Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989). Two of petitioners' brethren, Judges Greene and McHaney, have already dropped out of this suit upon reaching age of seventy. Judge Nugent himself will be forced to retire on his seventieth birthday, December 6, 1990, unless a stay of the effectiveness of Section 476.683 can be obtained and thereby prevent the forfeiture of Judge Nugent's pension while this case is pending, whether on petition for writ of certiorari or on the merits. The practical effect of a delay in reviewing the applicability of the ADEA to appointed state court judges is that competent, experienced judges will be forced to retire against their will and in violation of the ADEA.

IV.

THE "ELECTED TO PUBLIC OFFICE" EXEMPTION FROM ADEA COVERAGE DOES NOT PROVIDE AN INDEPENDENT BASIS FOR AFFIRMING THE EIGHTH CIRCUIT DECISION

Respondent's contention that Missouri's appointed judges fall into the "elected to public office" exemption from the definition of "em-

ployee," 29 U.S.C. § 630(f), is incorrect and does not provide an independent basis for affirmance of the Eighth Circuit judgment.

First, if respondent is attempting to preserve this issue for review, the Eighth Circuit noted that it is not properly preserved, because the Governor did not cross-appeal and neither side briefed the issue in the Eighth Circuit. *Gregory v. Ashcroft, reprinted in* Petition at A-5. Recognizing this Court's doctrine that the prevailing party may assert in a reviewing court any ground in support of the judgment, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970), we next address the merits to show that there is no independent basis for affirmance.[2]

Second, the plain language of the statute exempts from ADEA protection "any person elected *to* public office." 29 U.S.C. § 630(f) (emphasis added). Those Missouri judges that are selected pursuant to the Non-Partisan Court Plan, Mo. Const. art. V, § 25(a), are *appointed* to the bench, *not* elected. It is well known in Missouri, as Judge Hungate found in the district court, that all of the state's appellate judges, *e.g.*, Judge Nugent, as well as the trial judges in the major metropolitan areas, *e.g.*, Judge Gregory, are *appointed* and *not* elected to office. *See Gregory v. Ashcroft*, No. 88-0221C(3) (E.D. Mo. July 14, 1989), *reprinted in* Appendix B of the Petition at A-20 n.3.

Although appointed Missouri judges do submit to a retention referendum, they are not opposed, and the issue is not whether to elect them from among other candidates, but whether to retain them in their appointed office. *See* Mo. Const. art. V, § 25(c)(1), *reprinted in* Appendix C of the Petition at A-27 to A-28. If a judge is not retained or if a vacancy occurs for any other reason such as death or retirement, the vacancy is again filled by the Governor through *appointment* of a replacement. Mo. Const. art. V, § 25(c)(1); *id.* § 25(a).

---

[2] Under the line of cases cited in *Dandridge* and in light of the parties' failure to even brief the issue in the Eighth Circuit, petitioners suggest that the more appropriate course of action would be to address the policymaking exemption in this Court, and if necessary address the "elected to public office" exemption on remand. *See Dandridge*, 397 U.S. at 475 n.6; *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947).

Under these circumstances, Missouri judges that are appointed pursuant to the Non-Partisan Court Plan cannot be said to be "elected to public office" within the meaning of that term in the ADEA.

V.

RESPONDENT FAILED TO DISCUSS OR REBUT PETITIONERS' CONTENTION THAT THE EIGHTH CIRCUIT'S RATIONAL BASIS ANALYSIS IS IN CONFLICT WITH THIS COURT'S EQUAL PROTECTION DECISIONS

By addressing the level of constitutional scrutiny to which the classification of the aged is entitled, respondent offered a "red herring" and failed to address the constitutional error alleged by petitioners. Petitioners did not argue that they were entitled to heightened scrutiny. Petitioners argued instead that the decision below cannot stand under traditional rational basis analysis and this Court's decisions in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In their petition, petitioners argued that three of the four legislative purposes, allegedly advanced by the Mandatory Retirement Provision and relied upon by respondent and the courts below as being rationally based, were facially invalid under *Cleburne*. Petition at 14. Respondent failed to even address that contention.

Instead, respondent's Brief in Opposition focused upon the fourth purpose that allegedly provides another rational basis for upholding the Mandatory Retirement Provision, *i.e.*, Missouri's interest "in maintaining a highly qualified and vigorous state judiciary" by drawing "a line at an age at which there is often a lessening in mental and physical abilities." See Petition at 14 (quoting the decision below, reprinted in Appendix at A-15). Petitioners asserted that if the Mandatory Retirement Provision excluded from service so few judges who were in fact unqualified, then under *Murgia* the retirement age of seventy would be wholly unrelated to the object of the statute and therefore irrational and unconstitutional. Petition at 14-15. Accordingly, petitioners argued that the district court was premature in

dismissing petitioners' complaint without allowing the presentation of any evidence to show the rational basis for the state's selection of age seventy as the age at which a constitutionally significant number of judges decline in their mental and physical ability to perform their duties. Petitioners therefore contended that they were entitled to an evidentiary hearing, at which they could have attempted to prove the irrationality of the state's selection of an age seventy retirement date.

Respondent contends that as a matter of law and apparently in all cases, an evidentiary hearing is not required to sustain a motion to dismiss. Brief In Opposition at 16 (citing as support this Court's decision in *Pennell v. City of San Jose*, 481 U.S. 1, 108 S.Ct. 849 (1988)). While an evidentiary hearing may not have been required in *Pennell*, respondent is incorrect in his contention that an evidentiary hearing is not required as a means of showing the rationality of the age seventy retirement date with respect to the state's avowed purpose of assuring a vigorous and healthy judiciary.

Pennell is clearly distinguishable from the case at bar. *Pennell* involved a rent control statute that the petitioner contended was facially invalid. 481 U.S. at ___, 108 S.Ct. at 857. The statute itself, however, required a particularly detailed factual finding by a hearing officer before allowing an additional rent increase over and above certain amounts that were deemed reasonable under the statute. Under those circumstances and in light of such detailed factual findings, this Court had no difficulty in holding that such a statute, "which so carefully considers both the individual circumstances of the landlord and tenant . . . does not on its face violate the Fourteenth Amendment's Due Process Clause." *Id.* at ___, 108 S.Ct. at 858-59.

In contrast to the detailed factual findings required by the statute in *Pennell*, the Mandatory Retirement Provision and the Eighth Circuit decision below required no factual finding of any kind to establish the rational basis of Missouri's Mandatory Retirement Provision. This Court upheld a mandatory retirement provision in *Murgia*, but only after extensive evidence had been presented and only after petitioners had failed to show that the retirement age selected was "wholly unrelated" to the state's objective in insuring the "physical prepared-

ness" of its police. *Murgia*, 427 U.S. at 314-16. With respect to Missouri's alleged purpose in maintaining a "vigorous state judiciary" by arbitrarily selecting an age at which there may (or may not) be a decline in mental and physical abilities, a similar factual inquiry should be required.

Given Missouri's inability to establish a rational basis for selecting judges as the only persons subject to a mandatory retirement policy among all state employees in non-physically demanding jobs, this Court should grant petitioners' second question presented in their petition for a writ of certiorari and address the constitutionality of the Mandatory Retirement Provision as applied to all judges in the state of Missouri, whether appointed or elected.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

DATED this 12th day of November, 1990.

Respectfully submitted,
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Supreme Court, U.S.
FILED
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(5)

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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CERTIORARI GRANTED NOVEMBER 26, 1990

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Relevant Docket Entries

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

NO. 88-0221-C-3

February 4, 1988	Complaint filed
July 20, 1988	Motion for leave to file supplemental complaint filed with memorandum in support
July 22, 1988	Supplemental complaint filed
October 19, 1988	Motion to dismiss filed with memo in support
March 31, 1989	Letter from Judge Hungate to EEOC filed
April 12, 1989	Letter from EEOC to Judge Hungate filed
July 14, 1989	Defendant's answers to interrogatories filed
July 14, 1989	Order granting motion to dismiss filed
August 7, 1989	Notice of Appeal filed

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2360EM

August 23, 1989	Expedited Briefing Schedule filed
September 15, 1989	Brief for the Appellants and Joint Appendix filed
September 15, 1989	Brief for the EEOC as amicus curiae filed
October 13, 1989	Brief for Appellee filed
October 23, 1989	Reply Brief filed
March 5, 1990	Opinion and Judgment of Court of Appeals entered

May 24, 1990	Time for filing petition for writ of certiorari extended by Justice Blackmun to July 3, 1990
July 3, 1990	Petition for a writ of certiorari filed
November 26, 1990	Petition for a writ of certiorari granted

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-0221-C-3

THE HONORABLE ELLIS GREGORY, JR.,
THE HONORABLE ANTHONY P. NUGENT, JR.
THE HONORABLE DOUGLAS W. GREENE, and
THE HONORABLE FLAKE L. MCHANEY,
Plaintiffs,

v.

THE HONORABLE JOHN D. ASHCROFT,
Defendant.

SUPPLEMENTAL COMPLAINT

Come now plaintiffs, by and through their attorneys, and as and for their cause of action against defendant allege and state as follows:

JURISDICTION

1. This action is brought under the Declaratory Judgment Act, 28 U.S.C. 2201. Jurisdiction of this Court is founded upon the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634, as amended by Public Law 99-592 (effective January 1, 1987) and upon Amendment XIV of the United States Constitution.

PARTIES

2. Plaintiff Ellis Gregory, Jr. is an Associate Judge of the Twenty-First Judicial Circuit of Missouri, and is a resident of and performs his official duties in the Eastern District of Missouri.

3. Plaintiff Anthony P. Nugent, Jr is a Judge of the Missouri Court of Appeals, Western District, and is a resident of and performs his official duties in the Western District of Missouri.

4. Plaintiff Douglas W. Greene is a Judge of the Missouri Court of

Appeals, Southern District, and is a resident of and performs his official duties in the Southern District of Missouri.

5. Plaintiff Flake L. McHaney is a Judge of the Thirty-Fifth Circuit of Missouri, and is a resident of and performs his official duties in the Eastern District of Missouri.

6. Defendant John D. Ashcroft is Governor of the State of Missouri.

BACKGROUND

7. Plaintiff Ellis Gregory, Jr. ("Gregory") was born on May 5, 1927 and has served continuously as a Judge of the State of Missouri since 1978.

8. Anthony P. Nugent, Jr. ("Nugent") was born on December 6, 1920 and has served continuously as a Judge of the State of Missouri since 1981.

9. Plaintiff Douglas W. Greene ("Greene") was born on March 18, 1920 and has served continuously as a Judge of the State of Missouri since 1979.

10. Plaintiff Flake L. McHaney ("McHaney") was born on September 25, 1920 and has served continuously as a Judge of the State of Missouri since 1973.

11. Each of the plaintiffs is in good physical and mental health, has long and exemplary tenure as a judicial officer of the State of Missouri, and is eminently qualified to perform the duties of judicial office.

12. State Court Judges in Missouri are by the laws of the state divided into two categories. In one, the Judge is nominated through election in the state partisan primary elections and elected in the state partisan general elections, as are all other elected state officials. The second category are those Judges whose offices are part of the Missouri nonpartisan selection of judges plan, a plan which was a revolutionary alteration of the pattern of electing State Judges in this country. Judges under the Missouri non-partisan plan are selected to hold office by the Governor of Missouri, his selection being made from

a panel of three qualified persons chosen by a Missouri Nonpartisan Judicial Commission. Missouri Constitution Article V, 25(a).

13. Plaintiffs Gregory, Nugent and Greene each attained judicial office by appointment by the Governor or, after initial selection by and approval of a Missouri Nonpartisan Judicial Commission, by appointment by the Governor. Missouri Constitution Article V, § 25(a). As such, plaintiffs Gregory, Nugent and Greene were not selected for office by election.

14. Plaintiff McHaney, after initially filling the vacancy of an unexpired term of office for Judge of the 35th Judicial District in 1973, has been elected to that office in the general election every six years since the end of that unexpired term.

15. Article V, § 26 of the Missouri Constitution provides, in pertinent part: "1. All judges other than municipal judges shall retire at the age of 70 years."

16. Accordingly, each of the plaintiffs may be forced to retire upon achieving the age of seventy if defendant attempts to enforce the above-mentioned Constitutional provision.

17. Moreover, on or about June 23, 1988, defendant signed into law Senate Bill No. 425, which reads in pertinent part:

> Section 3. Except as provided in subsection 24 of section 27 of article V of the Missouri constitution, any judge who becomes eligible after the effective date of this section for annual compensation, salary or retirement compensation pursuant to sections 476.450 to 476. 595, RSMo, but fails to retire on or before his seventieth birthday shall automatically waive all such annual compensation, salary and retirement compensation.

18. Each of the named plaintiffs will become eligible after the effective date of the above-cited section for annual compensation, salary or retirement compensation pursuant to sections 476.450 to 476.595 RSMo. Thus, plaintiffs will be forced to retire at age seventy or will automatically waive any annual compensation, salary or

retirement compensation to which they would each be otherwise entitled.

19. Plaintiffs Gregory, Nugent and Greene, as well as others unnamed who similarly serve as non-elected judges, and plaintiff McHaney, as well as others unnamed who similarly serve as elected judges, are denied the present right to make plans for their careers due to the doubt and uncertainty of the legality of this mandatory retirement age, and that denial is now and will continue to be a source of irreparable harm to these plaintiffs, for which they have no adequate remedy at law.

20. The forced judicial retirement provision of the Missouri Constitution arbitrarily deprives Missouri Judges of their employment solely on the basis of age, rather than on the basis of any rational test of physical, mental or professional ability, contrary to the prevailing public policy in the United States.

21. If, pursuant to the mandatory retirement provisions of the Missouri Constitution, the office of any judge serving under the nonpartisan court plan should be declared to be open due to the age of the judge without the consent of that judge, that vacancy would not be filled until the Governor selected one person from a panel chosen by a judicial commission. In addition, by virtue of his office the Governor is committed to the enforcement of the Missouri Constitution, including that provision mandating retirement of all judges solely on the basis of age. The Governor of Missouri, therefore has the sole and final authority to enforce the constitutional retirement provision. Thus, an actual controversy exists between the plaintiff judges and the defendant Governor.

22. A less intrusive and more rational basis for retiring judges who, due to age, are physically or mentally incapable of performing the duties of their office already exists in Missouri Constitution V, § 24.

23. Over a period of many decades, a system of forced retirement based solely on age became an ingrained part of both public and private employment practice in this country. This age discrimination in employment came to be recognized as a national tragedy which

represented a great waste of one of our most precious resources, the talent and accumulated experience of older workers, in both public and private employment.

24. Judges are, with possible exceptions not here relevant, the only public servants, employees or officers except those subject to hazardous duties who continue to be subject to mandatory retirement based solely on age.

COUNT I

Come now plaintiffs Gregory, Nugent and Greene, and for Count I of their amended complaint, state as follows:

25. Paragraphs 1 through 24 are realleged and reasserted as if fully set forth herein.

26. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, et seq. ("ADEA"), prohibits employers from terminating the employment of any individual over 40 years of age based upon that individual's age. 29 U.S.C. § 623(a) and § 631(a), as amended by Public Law 99-592 (effective January 1, 1987).

27. The State of Missouri is an "employer" within the definition of the ADEA. 29 U.S.C. § 630(b).

28. Plaintiffs Gregory, Nugent and Greene are "employees" within the definition of the ADEA. 29 U.S.C. § 630(f).

29. Because Article V, § 26 of the Missouri Constitution mandates the retirement of judges based solely upon their age, such provision violates the ADEA.

30. Exhaustion of administrative remedies is inappropriate in this matter because, as yet, none of the plaintiffs has attained the aforementioned mandatory retirement age. Additionally, exhaustion of administrative remedies is unnecessary because it is clear that administrative action cannot afford the relief sought herein.

WHEREFORE, plaintiffs Gregory, Nugent and Greene demand judgment declaring their rights as guaranteed by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, nullifying and declaring unenforceable those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425; for preliminary and permanent injunctions, enjoining defendant from enforcing those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425; and for such other relief as the Court may deem appropriate.

COUNT II

Come now each of the named plaintiffs, for themselves and all others similarly situated, and for Count II of their amended complaint, state as follows:

31. Plaintiffs reallege and reassert paragraphs 1 through 24 above.

32. The Missouri Constitutional requirement of mandatory retirement of judges at age seventy is arbitrary and has no rational basis and, thus, violates the due process protection of the United States Constitution, Amendment XIV.

33. The Missouri Constitutional requirement of mandatory retirement of judges at age seventy also unfairly discriminates against judges because other state officials are not similarly required to retire at age seventy, thus violating the Equal Protection of Laws guaranteed by the United States Constitution, Amendment XIV.

34. In the history of the State of Missouri, compulsory retirement was consistent with now obsolete social patterns which mandated the retirement of most employees at a given age. In the changing social environment of the nation and in accord with national policy and law, mandatory retirement in most areas of employment has been eliminated voluntarily or is now proscribed by federal law. Currently, the State of Missouri imposes mandatory retirement only upon judges and certain others who hold exceptionally dangerous, physical positions. Mandatory judicial retirement exists in Missouri not as a part of an

overall plan for retirement of those who serve the state but as an unique remainder of an obsolete scheme of retirement reflecting an ancient, illogical and now repudiated policy. It reflects no visible state policy, is violative of national purpose, is arbitrary, capricious and unreasonable and is, therefore, unconstitutional.

WHEREFORE, plaintiffs demand judgment declaring their rights to due process of law and of equal protection under the laws as guaranteed by Amendment XIV of the United States Constitution by nullifying and making unenforceable those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425; for preliminary and permanent injunctions, enjoining defendant from enforcing those Missouri Constitutional provisions which force judicial retirement solely by virtue of age and Section 3 of Senate Bill No. 425, and for such other relief as the Court may deem appropriate.

(Signatures and certificate of service omitted in printing)

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Title omitted in printing)

MOTION TO DISMISS

Comes now the defendant in the above-referenced legal proceeding, the Honorable John D. Ashcroft, Governor of the State of Missouri, and, pursuant to the provisions of Rule 12, Federal Rules of Civil Procedure, respectfully moves the Court to dismiss the complaint the plaintiffs filed herein, because the Court lacks jurisdiction over the subject matter thereof and because said complaint fails to state a cause of action upon which relief may be granted, in that:

1. The guarantees of the Fourteenth Amendment to the United States Constitution do not apply to issues of age, requiring the plaintiffs to state a cause of action under the Age Discrimination in Employment Act, providing statutory remedies, in order to proceed; and

2. The Age Discrimination in Employment Act is inapplicable upon the face of the allegations in plaintiffs' complaint, because:

(a) The plaintiffs failed to exhaust their administrative remedies which are jurisdictional prerequisites to the initiation of suit, and

(b) The Plaintiffs lack standing to sue under the ADEA or to challenge Section 3 of Senate Bill 425, and

(c) The plaintiffs are not employees covered under the Age Discrimination in Employment Act.

In support of this motion, the defendant attaches hereto his suggestions.

(Signatures and certificate of service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 89-2360EM

Honorable Ellis Gregory, Jr.;
Honorable Anthony P. Nugent,
Jr.; Honorable Douglas W.
Greene and Honorable Flake L.
McHaney,
Appellants.

vs.

Honorable John D. Ashcroft,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Missouri

This appeal from the United District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 5, 1990

A true copy.

/s/ Robert D. St. Vrain, Clerk

ATTEST:

Clerk, U. S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 3/26/90

Supreme Court, U.S.
FILED
JAN 17 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

I.

Whether appointed Missouri state court judges are "appointee[s] on the policymaking level" within the meaning of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1988), and thus exempted from the ADEA's general prohibition of mandatory retirement and subject to the mandatory retirement provision of Article V, Section 26 of the Missouri Constitution.

II.

Whether the mandatory retirement at age seventy of Missouri state court judges, pursuant to Article V, Section 26 of the Missouri Constitution, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, given Missouri's selective imposition of mandatory retirement only upon its judges over age seventy among all of its employees in non-physically demanding jobs including judges under the age of seventy.

LIST OF PARTIES

The plaintiffs in the proceeding below, in addition to the petitioners, Judges Ellis Gregory, Jr. and Anthony P. Nugent, Jr., were Judges Douglas W. Greene and Flake L. McHaney. Respondent John D. Ashcroft, Governor of the State of Missouri, was the only defendant below. The United States Equal Employment Opportunity Commission appeared as *amicus curiae* in the court of appeals.

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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, Governor of the State of Missouri,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion, Petition at A-1 to A-16 and judgment, J.A. at 11, of the Court of Appeals is reported at 898 F.2d 598. The district court opinion by Judge William L. Hungate is unreported, but is reprinted in the Petition at A-17 to A-26.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 5, 1990. J.A. at 11. On May 24, 1990 Justice Blackmun extended the time for filing a petition for a writ of certiorari until July 3, 1990.

Petitioners timely filed their petition on July 3, 1990, Petition at 16, and this Court therefore has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The ADEA section that prohibits age discrimination provides:

It shall be unlawful for an employer —

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a).

The ADEA definition of an "employee" provides:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C. § 630(f).

The ADEA section that prescribes "age limits" provides: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." 29 U.C.S. § 631(a).

Article V, Section 26 of the Missouri Constitution ("the Mandatory Retirement Provision") provides:

> (1) All judges other than municipal judges shall retire by the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.
>
> (2) All judges may retire at an earlier age authorized by law and may participate in a retirement plan provided by law.
>
> (3) Any retired judge, associate circuit judge or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge he shall have the same powers as an active judge.

Mo. Const. art. V, § 26.

Article V, Section 25(a) of the Missouri Constitution ("the Judicial Appointment Provision") provides:

> Whenever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson county, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy.

Mo. Const. art. V, § 25(a)

STATEMENT OF THE CASE

1. Introduction. Petitioners are Missouri state court judges. This case addresses whether a Missouri constitutional provision which mandates that Missouri's state court judges retire upon attaining the age of seventy, Mo. Const. art. V, § 26 ("the Mandatory Retirement Provision"), contravenes either the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602, *as amended and codified*, 29 U.S.C. §§ 621-34 (1988) ("the ADEA") or the Fourteenth Amendment to the United States Constitution.

The first question presented requires statutory interpretation to determine whether petitioners fall within the scope of the ADEA term, "appointee on the policymaking level." An "appointee on the policymaking level" is exempted from inclusion as a protected "employee" under the ADEA. 29 U.S.C. § 630(f). The other question presented is whether the State of Missouri's imposition of a mandatory retirement age upon only its judges over age seventy, among all of its employees in non-physically demanding jobs including judges under the age of seventy, violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. Statutory Framework Of The ADEA. The ADEA prohibits employers from discharging any "employee" because of the individual's age and from classifying its "employee[s]" in ways that adversely affect an individual's status as an employee because of the individual's age. 29 U.S.C. § 623(a). The state of Missouri is an "employer" under the ADEA. *Id.* § 630(b). The ADEA protects individuals who are at least forty years of age, *id.* § 631(a), who are employed by an "employer," *id.* § 630(f), and who are not otherwise exempted from status as an "employee." *Id.* Of the statutory exemptions, two are relevant to this case, those for "an appointee on the policymaking level" and for "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof." *Id.*

3. Organizational Framework Of The Missouri Judiciary. For purposes of this case the Missouri judiciary is composed of the Missouri Supreme Court, the Missouri Court of Appeals and the Missouri Circuit Courts.[1] Mo. Const. art. V, §1. Circuit judges and associate circuit judges are both judges of the circuit courts, *see* Mo. Const. art. V, §§ 15-16, although in some respects — such as the power to make local rules — associate circuit judges are not endowed with all the powers that are granted to circuit judges. *Id.* § 15(1). *See also* Mo. Rev. Stat. § 478.014 (1986) (distinguishing between circuit judges and associate circuit judges with respect to salary). All of the judges of these courts "shall retire at the age of 70 years." Mo. Const. art. V, § 26.

A bifurcated judicial selection system exists in Missouri. Under the Missouri Non-Partisan Court Plan ("the Missouri Plan"), Mo. Const.

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[1] Municipal judges are not subject to the Mandatory Retirement Provision and therefore are not discussed in this section. The Missouri Supreme Court has limited, exclusive appellate jurisdiction over certain cases, as well as generally discretionary appellate jurisdiction over cases decided in the court of appeals. Mo. Const. art. V, §§ 3, 10. The Missouri Court of Appeals has general appellate jurisdiction except where the Missouri Supreme Court has been vested with exclusive appellate jurisdiction. *Id.* § 3. The circuit courts have original jurisdiction of all civil and criminal cases and matters. *Id.* § 14.

art. V, § 25, the governor of the state of Missouri appoints judges[2] to fill vacancies in all of Missouri's appellate courts, and in the circuit courts in metropolitan St. Louis and Kansas City. *Id.* § 25(a). Judges in the circuit courts outside these two metropolitan areas are not appointed by Governor Ashcroft pursuant to the Missouri Plan, but instead are elected in partisan primary and general elections. Mo. Rev. Stat. § 478.010 (1986). *See id.* §§ 115.339, 115.321 (candidates "for elective office" must file for nomination through primary election or as an independent candidate).

Judges like petitioners, who have been appointed to office pursuant to the Missouri Plan, do not run for re-election against opponents in partisan elections. Appointed, "Missouri Plan" judges are periodically listed on the ballot as subject to the questions of retention, although they face only a "yes or no" vote on whether each "shall be retained in office." Mo. Const. art. V, § 25(c)(1). In contrast, the non-Missouri Plan, elected circuit judges from outside the Kansas City and St. Louis metropolitan area, *e.g.*, former plaintiff McHaney,[3] are subject to opposed, partisan re-election contests. *Compare* Mo. Rev. Stat. § 478.010 (election of circuit judges who are not subject to the Missouri Plan)[4] *with* Mo. Const. art. V, § 25(c)(1) (retention question under the Missouri Plan), *reprinted in* Petition at A-27 to A-28.

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[2] The Governor selects the person to be appointed as judge from a panel of three candidates chosen by a Non-Partisan Judicial Commission. Mo. Const. art. V, §§ 25(a), 25(d).

[3] Judge Flake L. McHaney reached age seventy on September 25, 1990. He did not seek an injunction and retired without seeking review in this Court.

[4] Section 478.010 provides in pertinent part:

> Except as provided in section 25 of article V of the Constitution of Missouri, the circuit judges of the various judicial circuits shall be elected at the general elections as herein provided and at the general election every six years thereafter. . . .

Mo. Rev. Stat. § 478.010

4. Proceedings In The District Court. Petitioners and two other Missouri state court judges filed suit in the United States District Court for the Eastern District of Missouri to challenge the validity of the Mandatory Retirement Provision. Petitioners claimed that the Mandatory Retirement Provision[5] violated both the ADEA and the Equal Protection Clause of the Fourteenth Amendment. J.A. at 3-9. Governor Ashcroft responded to the Supplemental Complaint by filing a motion to dismiss. J.A. at 10.

On July 14, 1989 United States District Judge William L. Hungate granted the motion to dismiss. The district court held that Missouri's appointed state court judges were not "elected *to* public office," and therefore were not exempted from the ADEA's definition of "employee" on that ground. Petition at A-20 n.3 (emphasis by the district court). Judge Hungate ruled, however, that appointed state court judges are exempted from ADEA coverage under another portion of 29 U.S.C. § 630(f) as "appointee[s] on the policymaking level." Petition at A-20 to A-22

In dismissing petitioners' equal protection claim, the district court ruled that Missouri has a rational basis for its imposition of a mandatory retirement age upon its judges. Petition at A-23. Judge Hungate relied upon a Missouri Supreme Court opinion, *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978) (*en banc*), as support for his finding that Missouri has a rational basis for the Mandatory Retirement Provision. Among the rational bases found by the district court were that the Mandatory Retirement Provision would insure a vigorous, healthy and vital judiciary, avoid the difficult decision of determining whether judges are incompetent after a certain age, increase the opportunity for younger persons to serve in the judiciary, and assure predictability and ease in administering judges' pension plans. Petition at A-24 to A-25.

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[5] The plaintiffs in the district court also challenged the validity of Senate Bill 425, *codified at* Mo. Rev. Stat. § 476.683 (Cum. Supp. 1989), which provides for the automatic forfeiture of salary and retirement compensation in the event that a judge who has attained age seventy does not retire. J.A. at 3-9.

5. Proceedings In The Court of Appeals. Petitioners and the other plaintiff judges appealed the dismissal of their ADEA claim on the ground that judges are not "appointee[s] on the policymaking level."[6] Writing for the Eight Circuit panel, Judge Pasco M. Bowman affirmed the district court's dismissal of petitioners' complaint, Petition at A-3, and agreed that appointed judges are exempted from the ADEA's definition of "employee" as "appointee[s] on the policymaking level." Petition at A-6 to A-8. In reaching this conclusion Judge Bowman stated that judges occasionally resolve unsettled issues and thus "create law," as well as "exercise considerable policymaking responsibility in the supervision of the Missouri court system." *Id.*

In affirming the district court's dismissal of petitioners' constitutional claim, the Eighth Circuit agreed that the bases for the Mandatory Retirement Provision, as expressed by the Missouri Supreme Court in *O'Neil v. Baine*, were indeed rational. Petition at A-14 to A-16. Petitioners had argued that the Mandatory Retirement Provision was constitutionally deficient under *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), because the state was relying "on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Brief for the Appellants at 16-17 (8th Cir. filed Sept. 15, 1989) (quoting *Cleburne*, 473 U.S. at 446). Although the Eighth Circuit acknowledged that "[o]ne might disagree with some or all of these rationales," it nevertheless held that the Mandatory Retirement Provision had a rational basis sufficient to withstand constitutional scrutiny. Petition at A-16.

SUMMARY OF ARGUMENT

Petitioners are protected "employees" under the ADEA. The ADEA applies to the states, and the state of Missouri is an "employer"

[6] Governor Ashcroft did not cross-appeal the district court's ruling that appointed state court judges are not subject to the "elected to public office" exemption under section 630(f). *See* Petition at A-5. The governor had argued unsuccessfully in the district court that the "elected to public office" exemption was applicable to appointed judges that are subsequently retained in office by a vote of the electorate. Suggestions In Support Of Defendant's Motion To Dismiss at 7, No. 88-0221-C-3 (E.D. Mo. filed Oct. 19, 1988).

under the Act. Missouri state court judges work for the state of Missouri. Accordingly, petitioners are "employee[s]" under the ADEA, unless they fall within the scope of one of the specific statutory exemptions from status as "employee[s]."

The ADEA is a remedial statute combating the perceived evil of age discrimination. The class of people protected by the ADEA should therefore be construed liberally and exemptions from the protected class should be construed narrowly. This construction is supported by the conference report in the legislative history, which specifically states that the exemptions should be construed narrowly.

As appointed Missouri Plan judges, petitioners are not exempted from status as "employee[s]" under the ADEA. First, Missouri Plan judges are not "elected to public office"; they are appointed to office by Governor Ashcroft. Second, Missouri Plan judges are not otherwise exempted as "appointee[s] on the policymaking level."

The plain language and organization of the statutory exemptions dictates that appointed state court judges are not "appointee[s] on the policymaking level." The policymaking exemption is placed in the middle of a list of three exemptions that follow the "elected to public office" exemption. The first of those three exemptions applies to persons on the elected official's personal staff; the third applies to close advisers of the elected official. Both the first and third exemption clearly apply only to persons who are in a close working relationship with an elected official. Under well accepted rules of statutory construction, the term placed in the middle of a list should be construed in the context of the surrounding terms. Therefore, the policymaking exemption should be construed to involve a relationship with the elected official like that of his "immediate adviser" or "personal staff" members. Thus, the "appointee on the policymaking level" exemption should only include persons who implement or formulate "policy" in conjunction with or at the direction of the elected official.

The legislative history supports petitioners' argument that the policymaking exemption only applies to persons in a close working relationship with an elected official. The overall purpose of the

policymaking exemption was to make the ADEA applicable to the states. The "elected to public office" exemption from the definition of "employee" was derived from a perceived need to insulate elected officials from claims of age discrimination by the electorate. The other exemptions in addition to that for persons "elected to public office" were drafted to include ancillary advisers of elected officials, thereby insuring that newly elected officials would be able to employ people of their own choosing to advise and assist the newly elected officials in formulating and supporting their own policies.

Missouri state court judges are not such persons. The Separation of Powers provision of the Missouri Constitution prohibits the judicial branch of the government from working with or assisting the legislative or executive branches of government. Moreover, judges simply are not policymakers; they are required to leave policymaking to the other branches of government. Judges do not give advisory opinions. Their primary responsibility is to apply existing law to actual cases or controversies and to leave questions of policy to the other branches of government. Accordingly, the policymaking exemption is not applicable to appointed state judges.

Under the U.S. Constitution's Fourteenth Amendment petitioners and other Missouri judges of age seventy are denied equal protection under the law by the Mandatory Retirement Provision's requirement that only judges of age seventy retire, among all the state employees in non-physically demanding jobs — including judges younger than age seventy. Although age is not a suspect class and this Court has determined that traditional rational basis analysis is the appropriate standard of review, the classification at issue cannot even pass muster under the rational basis test.

With the exception of the purpose of insuring a physically and mentally fit judiciary, all of the reasons asserted by the state in its interrogatory answers as justification for the Mandatory Retirement Provision (and assumed as true by the Eighth Circuit) are equally applicable both to judges younger than age seventy and to all other state employees in non-physically demanding jobs — groups upon whom Missouri does not impose mandatory retirement. Judges of age

seventy do not threaten the interests of the state of Missouri in ways that other state employees over age seventy do not and in ways that younger judges do not. Therefore, the mandatory retirement of judges at age seventy, based on the reasons other than mental and physical fitness that were identified by the State and lower courts in this case, is irrational and violates the Fourteenth Amendment on its face.

Likewise, unless Missouri can establish that the age seventy retirement date serves to select for retirement a significant percentage of judges who are no longer physically and mentally capable of competently performing their job and duties, then the selection of that age is not rationally related to the legislative purpose of insuring a competent judiciary that is vigorous, healthy and mentally and physically capable. Therefore, without proof that the age seventy retirement date insures a healthy judiciary by eliminating a significant percentage of judges who are no longer physically and mentally capable, the Mandatory Retirement Provision violates the Fourteenth Amendment as applied.

ARGUMENT

I. AS APPOINTED JUDGES NOT "ON THE POLICYMAKING LEVEL" PETITIONERS ARE PROTECTED "EMPLOYEE[S]" UNDER THE ADEA AND ARE NOT SUBJECT TO THE MISSOURI CONSTITUTION'S MANDATORY RETIREMENT PROVISION.

A. The ADEA Applies To The States And Protects State Employees Above Age Forty, So Long As Those Employees Do Not Fall Within The Statutory Exemptions From The Definition Of "Employee."

The purpose of the Age Discrimination in Employment Act is "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b)) (1988). The ADEA now protects any "employee" who is forty years of age or older, 29 U.S.C. § 631(a) (1988), as a result of Congress' amendment of the ADEA by removing any upper age limit.[7] *See* Pub. L. 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (1986). The ADEA makes it unlawful for an employer (1) to discharge any employees because of their age or (2) to classify any employees in ways that adversely affect their status as employees because of their age. 29 U.S.C. § 623(a) (1988). A provision mandating retirement at a certain age unquestionably classifies employees in a way which adversely affects their status as an employee.

Although the ADEA did not originally apply to the states, *see* Pub. L. 90-202, § 11(b), 81 Stat. 602, 605 (1967), Congress amended the ADEA to make it applicable to the states by including them within the definition of an "employer" in 1974. Pub. L. 93-259, § 28(a), 88 Stat. 55, 74 (1974). The ADEA definition of an "employer" includes within its definition "a State or political subdivision of a State or any agency or instrumentality of a State or political subdivision of a State." 29 U.S.C. § 630(b) (1988). This Court has previously upheld the

[7] As originally enacted the ADEA protected people age forty or above, but with an upper age limit of sixty-five. *See* Pub. L. 90-202, § 12, 81 Stat. 602, 607 (1967). In 1978 the upper age limit was raised to seventy. Pub. L. 95-256, § 3(a), 92 Stat. 189, 189 (1978).

constitutionality of applying the ADEA to the states. *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). Accordingly, as conceded by Governor Ashcroft, the State of Missouri is an "employer" under the ADEA. Brief for Appellee at 4, *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990) (No. 89-2360EM).

The ADEA protects individuals that qualify as "employee[s]." 29 U.S.C. § 623(a). *See id.* § 630(f). As pertinent to this case, the ADEA broadly defines an "employee" and limits that definition with certain narrow exemptions:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer, to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

Id. § 630(f). Because the state of Missouri is an "employer," Missouri state court judges are "employee[s]" unless they fall into one of these specified exemptions. *Id.* § 630(f).

B. Petitioners And Other Similarly Situated State Court Judges Who Have Been Appointed To Office Pursuant To The Missouri Plan Do Not Fall Within The Scope Of The "Elected To Public Office" Exemption From The ADEA's Definition Of "Employee."

Preliminarily, petitioners do not fall into the "elected to public office" exemption. Section 630(f) exempts from ADEA protection "any person elected *to* public office." 29 U.S.C. § 630(f) (emphasis added). Those Missouri judges that are selected pursuant to the Missouri Plan, Mo. Const. art. V, § 25(a), are *appointed* to the bench, *not* elected. As Judge Hungate found in the district court, all of the state's appellate judges, *e.g.*, Judge Nugent, as well as the trial judges in the major metropolitan areas, *e.g.*, Judge Gregory, are *appointed*

and *not elected* to office. *See Gregory v. Ashcroft*, No. 88-0221-C-3, (E.D. Mo. July 14, 1989), *reprinted in* Appendix B of the Petition at A-20 n.3.

Although appointed Missouri judges do submit to a retention referendum, they are not opposed, and the issue is not whether to elect them from among other candidates, but whether to retain them in their appointed office. *See* Mo. Const. art. V, § 25(c)(1), *reprinted in* Appendix C of the Petition at A-27 to A-28. It should be noted that petitioners are specifically prohibited from participating in any political campaign. The Missouri Constitution provides: "No judge of any court in this state, appointed to or retained in office in the manner prescribed in [the Missouri Plan] shall directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in *any* political campaign." Mo. Const. art. V, § 25(f) (emphasis added). If a judge is not retained, or if a vacancy occurs for any other reason such as death or retirement, the vacancy is again filled by the Governor through *appointment* of a replacement. Mo. Const. art. V, § 25(c)(1); *id.* § 25(a).

Under these circumstances, Missouri judges that are appointed pursuant to the Missouri Plan cannot be said to be "elected to public office" within the meaning of that term in the ADEA.[8]

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[8] Both the First Circuit in *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988), and the Eighth Circuit in this case reasoned that Congress must have intended to exempt appointed state court judges from the definition of "employee" in section 630(f) of the ADEA, because it would be "nonsensical" to have appointed judges protected under the ADEA while elected judges were not. Petition at A-11; 858 F.2d at 57.

The Second Circuit expressed sharp disagreement and noted that Congress could easily have exempted judges (if it intended to do so) by specifically including them in the statutory exemption from the definition of "employee." *EEOC v. Vermont*, 904 F.2d 794, 801 (2d Cir. 1990). "Any perceived imprudence in this dichotomy is a matter to be addressed to Congress." *Id.*

C. The Remaining Exemptions From The ADEA Definition Of "Employee," Including That For An "Appointee On The Policymaking Level," Are Limited To Persons Who Work In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them.

1. The Exemptions From The ADEA Definition Of "Employee" Should Be Construed Narrowly.

The ADEA is a remedial statute. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 409-12 (1985). Its purpose is "to promote employment of older persons based on their ability rather than their age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988). The definition of the persons entitled to its protection should therefore be construed broadly to effectuate Congress' stated remedial intent and purpose. *EEOC v. First Catholic Slovak Ladies Assoc.*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). *See Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (remedial statutes should be construed broadly); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (same). For the same reason, exemptions from the protected class of a remedial statute like the ADEA should be construed narrowly. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). *See also Western Air Lines, Inc. v. Criswell*, 472 U.S. at 413 (narrowly construing the Bona Fide Occupational Qualification (BFOQ) defense under the ADEA in the context of the mandatory retirement).

A. H. Phillips, Inc. v. Walling involved the interpretation of an exemption from the class of persons sought to be protected by the wage and hour provisions of the Fair Labor Standards Act of 1938.[9] *Walling*, 324 U.S. at 491-93. To effectuate that Act's remedial purpose of "ensuring to all our able-bodied working men and women a fair day's pay for a fair day's work," *id.* at 493, this Court held that any exemptions from its coverage must be construed narrowly. *Id.*

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[9] Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201 *et seq.*).

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. *To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.*

Id. (emphasis added). As additional support to this well established rule of statutory construction, Congress clearly expressed its intent that the exemption "shall be construed narrowly." *See infra* at 16-17 & n.11, 21.

2. *The Plain Language And Organization Of The Remaining Statutory Exemptions Indicates That The "Appointee On The Policymaking Level" Exemption Includes Only Those Persons Who Make Or Implement Policy In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them.*

The Eighth Circuit's conclusion that appointed state court judges are "appointee[s] on the policymaking level," Petition at A-12, as well as that of other courts,[10] fails to take into account the organization of the remaining statutory exemptions or to effectuate their plain meaning. Having previously shown that the "elected to public office" exemption is inapplicable, *supra* at 13-14, petitioners now address the remaining three statutory exemptions.

> The term "employee" shall not include any person elected to public office . . ., or [1] any person chosen by such officer to be on such officer's personal staff, or [2] an appointee on the policymaking level or [3] an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (numbers added by petitioners for clarity in discussion).

[10] *E.g., EEOC v. Massachusetts*, 858 F.2d 52, 54 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156, 159-60 (N.D. Ill. 1989); *EEOC v. Massachusetts*, 680 F. Supp. 455, 462 (D. Mass. 1988).

The "appointee on the policymaking level" exemption is placed in the middle of a list of the three remaining exemptions. Both the first and third of those exemptions plainly apply only to persons in an extremely close working relationship with the elected official — either as persons on the official's "personal staff" or as "an immediate advisor." *Id.* Given this limitation on the meaning of the first and third exemptions, well-established principles of statutory construction suggest that the "sandwiched" exemption for an "appointee on the policymaking level" should be similarly limited. *See, e.g., Third National Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

In *Jarecki*, this Court held that the word "discovery" may be used "in many contexts and with various shades of meaning." 367 U.S. at 307. By looking at the statute as a whole and not at the term in isolation, and thereby "gather[ing] meaning from the words around it," the *Jarecki* Court gained clarification of the meaning intended by Congress. *Id.* "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order *to avoid the giving of unintended breadth* to the Acts of Congress." *Id.* (emphasis added).

The phrase "appointee on the policymaking level" is similarly capable of differing shades of meaning. To a degree, any state employees that exercise discretion in the performance of their duties are engaged in policymaking, in its broadest sense. The *Jarecki* reasoning is particularly appropriate in this case to prevent an overly broad interpretation of an exemption from swallowing within its scope the very class of people that Congress sought to protect.[11]

By looking to the context of the phrases surrounding it, the "appointee on the policymaking level" exemption appears to be used by

[11] The legislative history, *see infra* at 18-21, specifically warned that the exemption should be construed narrowly — to avoid the possibility that the exemption would "establish an overall narrowing of the expanded coverage of State and local governmental employees." Conference Report on H.R. 1746 (Section-By-Section Analysis), 118 Cong. Rec. 7167 (1972).

Congress more narrowly than its broadest possible interpretation would allow; the exemption thus construed applies only to persons who advise or work closely with the elected official that chose the appointee. *See EEOC v. Vermont*, 904 F.2d 794, 798 (2d Cir. 1990). This narrow construction gives effect to the remedial intent of Congress in passing the ADEA and making it applicable to the states. *See supra* at 15-16. Narrow construction also comports with the directive in the legislative history that the exemption from the definition of "employee" be construed narrowly. *See infra* at 21; *supra* at 17 n.11.

3. The Legislative History Indicates That The "Appointee On The Policymaking Level" Exemption Includes Only Those Persons Who Implement Or Formulate Policy In Conjunction With Or At The Direction Of The Elected Official Who Appointed Them.

The legislative history of the ADEA is devoid of meaningful discussion of the definition of "employee." The ADEA definition, however, was taken verbatim from the definition passed by Congress two years earlier in amending Title VII of the Civil Rights Act of 1964 and making the Act applicable to the states. *See* The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) (exemption codified at 42 U.S.C. § 2000e(f)). This Court has previously found that relevant portions of Title VII's legislative history and judicial interpretation are applicable to the ADEA when the provisions are identical. *See, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Petitioners therefore rely upon the legislative history of the policymaking exemption in Title VII for guidance in determining Congress' intent when it passed identical language in the ADEA. *Accord EEOC v. Vermont*, 904 F.2d at 798.

Congress' express purpose in passing the exemption from the definition of "employee" was to:

> exclude . . . those persons elected to public office in any state or political subdivision. The exemption extends to persons chosen by such officials to be on their personal staffs, *appointees of such officials on the highest policymaking levels such as cabinet members or other immediate advisors of such elected officials with respect to the exercise of the constitutional or legal powers of the office held by such elected officer.*

Conference Report on H.R. 1746 (Section-By-Section Analysis), 118 Cong. Rec. 7166-67 (1972) (hereinafter "Section-By-Section Analysis") (emphasis added). *Cf.* H.R. Conf. Rep. No. 899, 92nd Cong., 2d Sess. (including *Joint Explanatory Statement of Managers At The Conference on H.R. 1746*) 15-16 (1972) ("persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level") (hereinafter "*Joint Explanatory Statement*"). In describing exempted appointees on the policymaking level as "cabinet members or other immediate advisers" of the elected official who hired them, Congress clearly expressed the limited nature of the exemption, as well as the intimate, ongoing relationship between the exempted "policymaking" appointee and the appointing elected official. *See* Section-By-Section Analysis, 118 Cong. Rec. at 7166-67. Congress explained the purpose of the exemption in its conference report, one of the most reliable indicators of legislative intent. *See National Ass'n of Greeting Card Publishers v. U. S. Postal Serv.*, 462 U.S. 810, 832 n.28 (1983).

The evolution of the exemptions during the legislative process helps explain how and why Congress drafted the version that was eventually enacted into law. The exemptions arose from Senator Ervin's concern that application of Title VII (and thus the ADEA) to the states could allow the results of elections and the selection of close advisors by the elected official to be questioned, based upon alleged discriminatory animus on the part of the electorate or the elected official. 118 Cong. Rec. 4096 (1972) (without exemption, motives of Governor in selecting cabinet could be questioned by EEOC, as could the motives of the people to see if they "were actuated [by discriminatory intent] in any extent in the election of a public official") (remarks of Sen. Ervin).

Senator Ervin first introduced the exemption from the definition of "employee" in a form that excepted only:

> any person elected to public office in any state or political subdivision of any state by the qualified voters thereof, or any persons chosen by such officer to advise him in respect to the exercise of the constitutional or legal powers of his office.

Amendment No. 888 to S. 2515, 92nd Cong., 2d Sess., 118 Cong. Rec. 4095 (1972), *reprinted in*, Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* at 1568 (1972). Senator Williams asked Senator Ervin whether the purpose of his amendment was "to exempt from coverage those who are chosen by the governor . . . and who are in a close personal and immediate relationship with him. Those who are his first line of advisors." *See* 118 Cong. Rec. 4492-93 (1972) (question of Sen. Williams). Senator Ervin acknowledged that "that is the purpose of the amendment." *Id.* at 4493 (statement of Sen. Ervin). *See also EEOC v. Vermont*, 904 F.2d at 799 (general discussion of Senate debate).

The language at issue in this case, regarding "appointees on the policymaking level" was not added to Senator Ervin's amendment on the floor of the Senate, but was contained in the amendment when it emerged from the subsequent conference on the bill. *See* H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 1 (1972). During the Senate debate the only mention of "policymaking" in connection with the exemption was by Senator Javits. 118 Cong. Rec. 4097 (1972) (statement of Sen. Javits). Citing his experience as attorney general in New York where he had 500 employees, Senator Javits inquired about "how deep you go when you say 'any person chosen by such officer to advise him. . . .'" *Id.* Senator Javits stated that his understanding of Senator Ervin's amendment exempting elected officials and their advisors was confined "to the higher officials in a policymaking or policy advising capacity." *Id.* Thus, the first mention of policymaking was made by a Senator that was attempting to *limit* the number of exempted advisors to elected officials — to keep the exemption from engulfing large groups of people several levels down the chain of command from the elected official. "Policymaking" was *not* mentioned in the context of creating an *additional* exemption for persons who did not work for the elected official.

Later, Senator Javits renewed his concern with limiting the close adviser and personal staff exemptions to high ranking policymakers working with the elected official in the manner of an executive official's cabinet.

> The other thing, the immediate advisers, I was thinking more in terms of a cabinet, of a Governor who would call his commissioners a cabinet, or he may have a cabinet composed of three of four executive officials, or five or six, who would do the main and important things. *That is what I would define those things expressly to mean.*

118 Cong. Rec. 4493 (1972) (statement of Sen. Javits) (emphasis added). Senator Ervin responded that the amendment as then written, *i.e.*, with what became the first and third exemptions following that for elected officials — personal staff and close advisers of the elected officials — was sufficient to meet Senator Javits' concerns. *Id.* (statement of Sen. Ervin). Eventually, however, the "appointee on the policymaking level" exemption was added by the Conference Committee.[12]

Thus, the language of the exemption, its explanation in the conference committee report, the conference committee's admonition that the exemption be construed "very narrowly," Section-By-Section Analysis, 118 Cong. Rec. 7167 (1972), and the discussion in the debates make it clear that Congress had a single purpose: to exempt elected officials and certain persons who work directly with them. Read as a whole, the exemption applies to elected officials, their personal staff, and their closest and highest level advisors.

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[12] Perhaps not surprisingly, Senator Javits was one of the managers at the conference where the ultimately enacted language appeared. *See Joint Explanatory Statement* at 22.

D. Missouri's State Court Judges Are Not "Appointee[s] On The Policy making Level" Because (1) They Are Not Policymakers And (2) They Do Not Work With, At The Direction Of, Or As Advisors To The Appointing Authority, As The Exemption Should Be Construed To Require.

1. Missouri State Court Judges Are Not Policymakers.

As the Second Circuit found in *EEOC v. Vermont*, contrary to the Eighth Circuit's conclusion in this case, Petition at A-12, appointed state court judges are not policymakers. *Vermont*, 904 F.2d at 800-01. *See also Schlitz v. Virginia*, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988). A judge's *primary* responsibility is to apply the laws and regulations passed by the legislative and executive branches of government to discrete cases or controversies. *EEOC v. Vermont*, 904 F.2d at 800-01.

Missouri state court decisions confirm that judges are not policymakers. *See, e.g., Brinkmann v. Common School Dist. No. 27*, 238 S.W.2d 1, 6 (Mo. Ct. App. 1951) (despite wish to rule otherwise, court was bound by the law and its "plain duty . . . to apply the law as written by the Legislature and leave to that tribunal the matter of determining questions of legislative policy"), *aff'd*, 255 S.W.2d 770 (Mo. 1953) (*en banc*).

> The questions of *policy* and expediency involved here *were for* the *General Assembly* and the *City Council* of the City of St. Louis. What is for the public good and what are public purposes and uses in the first instance are matters for legislative determination. Those legislative bodies, within their constitutional and statutory powers, may experiment. *Courts determine questions of power, not policy.*

Bader Realty & Investment Co. v. St. Louis Housing Authority, 358 Mo. 747, 217 S.W.2d 489, 493 (1949) (*en banc*) (emphasis added).

> We, too, could philosophize on these subjects, but the *policy* of legislative enactments is *not* for the courts. It is for the legislature. We should not "judicially legislate" so as to broaden the plain letter of the statute.

State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854, 859 (Mo. Ct. App. 1949) (emphasis added).

As the above cases specifically set forth, Missouri state court judges are not vested with "policymaking" authority. Civics classes throughout this Republic teach that the function of the judicial branch of government is to decide disputes in actual cases in accordance with the laws and regulations passed by the other branches of government. The judicial branch's review of the validity of laws and regulations is limited to determining whether the legislative and executive branches exceeded their authority in promulgating the laws and regulations. While a court may occasionally render "momentous" decisions that some may characterize as "policymaking," *e.g., Cruzan v. Director, Missouri Dept. of Health*, __ U.S. __, 110 S. Ct. 2841 (1990), for every such case there are dozens of others which involve policy only to the extent that they declare or apply that chosen by Congress. For several reasons, the occasional "momentous" court decision does not make judges "policymakers."

First, with respect to the occasional "momentous" decision, the better position is that such decisions interpret or apply the policy set forth in existing constitutions or laws. Thus, the right to die by refusing food and water is not a "policy" decision established by this or any other court, but is instead a policy that already is embodied and declared as a "liberty interest" in the United States Constitution, *Cruzan*, 110 S. Ct. at 2851 n.7 (1990), or as a specific right granted by statute. *See McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, 553 A.2d 594, 603 (1989). The magnitude and effect of these or any other "momentous" decisions may be great, but the policy was "made" when the statute or constitutional provision was passed or ratified, and not when the particular court announced its opinion.

Second, with respect to petitioners, Judge Nugent, as a court of appeals judge, is bound to follow the precedents of the Missouri

Supreme Court. Likewise, Judge Gregory, as an associate circuit judge, is bound to follow the pronouncements of the appellate courts. Moreover, as an *associate circuit judge*, he is on unequal footing with his fellow trial judges on the circuit court, the *circuit judges*, to the extent that he is denied the right given them to make the circuit court rules. *See* Mo. Const. art. V, 15(1). *Cf. Id.* § 15(3) (associate circuit judges may *vote* for presiding circuit judges, although they are not *eligible* to *be* presiding judge). To the limited extent that judges may engage in "policymaking," any such policymaking function is progressively less as the level of the judge within the judiciary is lower. It should be clear that petitioners are not policymakers.

As was succinctly stated by Judge Kearse for the Second Circuit, "the performance of traditional judicial functions is not policymaking." *EEOC v. Vermont*, 904 F.2d at 800. In disagreeing, the Eighth Circuit stated that judges are policymakers because in cases of first impression they "resolve issues previously unsettled and thus . . . create law." Petition at A-6. Judge Kearse rebutted that contention as follows:

> The principle business of the courts is the resolution of disputes. In some cases, the courts resolve those disputes merely by applying established legal principles; in others, they must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled. Even in the latter type of case, however, the courts are called upon primarily to fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy.

904 F.2d at 800. This Court should adopt the Second Circuit's reasoning and conclude that appointed state court judges are not policymakers.

2. *Missouri State Court Judges Are Not "Appointees On The Policymaking Level" Because They Do Not Work Closely With, At the Direction Of, Or As Advisors To The Appointing Authority, The Governor.*

The policymaking exemption, construed as advocated by petitioners, requires a close working relationship with the elected official. *See*

supra at15-21. Missouri state court judges clearly do not work with, at the direction of, or as advisors to the appointing authority, Governor Ashcroft. Therefore, they fall outside the scope of the policymaking exemption.

The Missouri Constitution specifically provides for the distribution and separation of powers among the three branches of government. Mo. Const. art. II, § 1. That provision specifically provides:

> The powers of government shall be divided into three distinct departments — the legislative, executive, and judicial — each of which shall be confined to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this Constitution expressly directed or permitted.

Id. See In re Pate, 107 S.W.2d 157, 162 (Mo. Ct. App. 1937) (the three governmental branches are each "given certain inherent powers" and each "must be kept separate and must operate in its own sphere"). The separation of powers requirements of the Missouri Constitution therefore preclude the Missouri judiciary from working with or at the direction of Governor Ashcroft.

The Missouri courts "will not render advisory opinions." *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. 1983) (*en banc*). *See International Telephone & Telegraph Corp. v. Smith*, 687 S.W.2d 194, 195 (Mo. 1985) (*en banc*) (Missouri Supreme Court has "long established practice of refusing to render advisory opinions"). The Missouri Circuit Courts and Missouri Court of Appeals "are without jurisdiction to render advisory opinions." *Wasinger v. Labor and Industrial Relations Comm'n*, 701 S.W.2d 793, 794 (Mo. Ct. App. 1985). Thus, the Missouri judiciary does not advise Governor Ashcroft on matters of policy.

Even if this Court were to conclude that some or all of the Missouri judiciary are "policymakers," it should hold that Missouri state court judges are not "appointee[s] on the policymaking level" under the ADEA. The Missouri judiciary does not advise Governor Ashcroft or

otherwise assist him in implementing and formulating policy, which the "appointee on the policymaking level" exemption should be construed to require. *See supra* at 15-21. Missouri's appointed state court judges therefore fall outside the scope of the exemption.

E. Conclusion.

For all the reasons set forth in the foregoing sections, this Court should hold that petitioners are protected employees under the ADEA. Accordingly, the Eighth Circuit's judgment should be reversed and enforcement of the Mandatory Retirement Provision against Missouri Plan judges like petitioners should be permanently enjoined.

II. THE MISSOURI CONSTITUTION'S MANDATORY RETIREMENT PROVISION VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Petitioners' second question presented is whether the Missouri Constitution's Mandatory Retirement Provision violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The class being discriminated against and denied equal protection is composed of state court judges of age seventy or above — regardless of whether the judge was initially appointed to office by the Governor pursuant to the Missouri Plan, or elected to office in the partisan general elections for certain circuit judges.[13] The Mandatory Retirement Provision disadvantages petitioners in favor of two separate groups — appointed and elected judges younger than age seventy, and all other state employees over the age of seventy in non-physically demanding jobs. Petitioners contend that there is no legitimate, rationally based purpose to support the Mandatory Retirement Provision. Governor Ashcroft[14] and the Eighth Circuit disagreed. Motion to Dismiss, J.A. at 10; Petition at A-16.

[13] Former Plaintiff McHaney was an elected circuit judge before he was forced to retire upon turning seventy on September 25, 1990.

In affirming the district court's dismissal of petitioners' equal protection claim, the Eighth Circuit relied primarily upon four reasons that purportedly provided a rational basis for Missouri's Mandatory Retirement Provision. Petition at A-15. These reasons were identified

[14] In his answers to interrogatories, Governor Ashcroft set forth a number of "reasons" that provide "rational bases" for the Mandatory Retirement Provision. Defendant's Answers to Plaintiffs' First Set of Interrogatories at 2-5, *Gregory v. Ashcroft*, No. 88-0221-C-3 (E.D. Mo. filed July 14, 1989) (hereinafter "Defendant's Answers to Interrogatories"). The Governor quoted and relied primarily upon reasons initially set forth by the Missouri Supreme Court in a 1978 case. *Id.* at 2-4. *See O'Neil v. Baine*, 568 S.W.2d 761, 766-67 (Mo. 1978) (*en banc*). The Governor also alleged that:

> It is also trued that a mandatory retirement policy for judges allows the judiciary, the governor, the Missouri bar, and the electorate to plan for and anticipate the appointment and advancement of qualified judicial candidates and present lower court judges. It is also true that a mandatory retirement policy motivates younger lawyers, and prospective lawyers, to strive hard for and to obtain the experience and legal knowledge necessary to attaining judicial positions, in the knowledge that vacancies will predictably occur.

Defendant's Answers to Interrogatories at 4.

When asked to "[i]dentify all persons who have knowledge of the rational basis for this provision," *id.* at 2, the Governor responded as follows:

> Every person understands, or should understand, the reasons or rational bases for a provision requiring the mandatory retirement of state court judges. Clearly it is impossible to identify every such person, *because the knowledge at issue is a matter of good common sense and an understanding of the vicissitudes of life and the aging process*. The defendant cannot believe that plaintiffs are serious in asking for the identity of all persons knowing about the "rational basis" for the existence of a state statute or constitutional provision. To the extent such an inquiry is ever answerable, we believe the first two sentences of this response are as complete as possible.

Defendant's Answers to Interrogatories at 5 (emphasis added).

Petitioners can understand why no one was specifically identified as having knowledge of the rational basis for the Mandatory Retirement Provision. "[G]ood common sense and an understanding of the vicissitudes of life and the aging process" can be understood in this context to mean "people over seventy just can't cut it."

as (1) "maintaining a highly qualified and vigorous state judiciary," allegedly obtained by drawing a line "at an age at which there is often a lessening in mental and physical abilities"; (2) avoiding the difficult determination of whether a judge is physically or mentally qualified; (3) increasing opportunities for younger lawyers; and (4) "ease in establishing and administering judge's pension plans." Petition at A-15.

The Eighth Circuit relied upon these bald assertions as justification for the Mandatory Retirement Provision, in contravention of the teachings of this Court's Equal Protection cases. The classification at issue in this case is age, and this Court has previously held that age is not a suspect class. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). Nevertheless, this Court has included the aged with the disabled, the mentally ill and the infirm, as groups which have "immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Cleburne*, 473 U.S. at 445-46. Accordingly, while heightened scrutiny would be inappropriate under these cases,[15] the aged are still entitled to meaningful and considered review under the rational basis standard: "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

The Eighth Circuit concluded that Missouri's Mandatory Retirement Provision for judges who have reached the age of seventy withstands the rational basis test, *i.e.*, the distinction between judges over and under the age of seventy is rationally related to legitimate governmental purposes. Petition at A-16. Measuring the four purposes previously identified as rational bases for the Mandatory Retirement Provision, *supra* at 28, against the standard identified in *Murgia* and *Cleburne*, the Eighth Circuit decision cannot stand.[16]

[15] An amicus brief suggests that heightened scrutiny should be applied in this case. *See* Brief of Amicus Curiae The Honorable John W. Keefe at 4-6, *Gregory v. Ashcroft*, No. 90-50 (U.S. *cert. granted* Nov. 26, 1990).

In *Cleburne* this Court struck down as arbitrary and irrational a zoning classification that singled out the mentally retarded, because the purposes allegedly supporting that classification were equally applicable to other groups that were not subjected to the same limitation. 473 U.S. at 447-48. In *Cleburne* a group home for the mentally retarded was required to obtain a special use permit when other permitted uses such as apartment houses, fraternity houses, dormitories, hospitals and nursing homes were not. *Id.* This Court concluded that the distinction was not constitutionally permissible because the record did not reveal any rational basis for believing that the group home for the mentally retarded posed any special threat to the city's legitimate interests in a way that other permitted uses like boarding houses and hospitals would not. *Id.* at 448.

Three of the four principal criteria relied upon by the Eighth Circuit as rational bases for Missouri's Mandatory Retirement Provision are equally infirm under *Cleburne*. The tedious, difficult and potentially embarrassing task of determining which judges are not physically and mentally qualified is no more onerous than the task of identifying which of any other state employees in non-physically demanding jobs are not mentally or physically qualified. Moreover, Missouri already has in place a far less restrictive alternative to mandatory retirement — the Commission on the Retirement, Removal and Discipline of Judges.

[16] To the extent that this Court's decision in *Vance v. Bradley*, 440 U.S. 93 (1979), supports the Eighth Circuit's decision in this case, petitioners submit that *Vance* is distinguishable. Petitioners do not face the "rigors of overseas duty" — a physical requirement not present in this case. *Cf. Vance*, 440 U.S. at 98. Nor has the state asserted the existence of a morale problem or need "to stimulate superior performance in the ranks." *Cf. id.* Moreover, to the extent that *Vance* may not be distinguishable, petitioners suggest that its analysis has been implicitly overruled by *Cleburne*.

Mo. Const. art. V, § 24(2).[17] Likewise, the provision of increased opportunities for the young results equally from the imposition of a mandatory retirement age in all state employment opportunities. Finally, the ease gained in establishing and administering judges' pension plans by having a mandatory retirement age is no greater than would be gained in any other pension plan administered by the State of Missouri.

Missouri's state court judges above age seventy do not threaten, to a greater extent than any other group of septuagenarian state employees, Missouri's interest in (1) avoiding difficult employee evaluations; (2) providing new employment opportunities for the young; and (3) administering state pension plans with ease. Accordingly, under *Cleburne* these three supposedly rational bases for Missouri's Mandatory Retirement Provision are irrational and violate the Equal Protection Clause of the Fourteenth Amendment. 473 U.S. at 448.

The remaining purpose relied upon by the Eighth Circuit as a rational basis for Missouri's Mandatory Retirement Provision is Missouri's interest "in maintaining a highly qualified and vigorous state judiciary" by drawing "a line at an age at which there is often a lessening in mental and physical abilities." Petition at A-15. This objective is nearly identical to the objective of the State of Massachusetts in the *Murgia* case, *i.e.*, the "physical preparedness" of the police. *See Murgia*, 427 U.S. at 314-15. This Court there upheld the rationality of an age fifty mandatory retirement date for state policemen. *Id.* at 314. In that case, however, an extensive factual record was developed in the district court. *Id.* at 310. This Court upheld the mandatory retirement age, but with the qualification that there "is no

[17] The pertinent Missouri constitutional provision for the Commission on the Retirement, Removal and Discipline of Judges provides:

> Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc shall retire from office any judge . . . who is found to be unable to discharge the duties of his office with efficiency because of permanent sickness or physical or mental infirmity.

Mo. Const. art. V, § 24(2).

indication that [the mandatory retirement statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." *Id.* at 315-16.

Like *Murgia*, there is no indication in this case that the age seventy retirement date for Missouri's state court judges has the effect of excluding from service a significant percentage of judges who are unqualified. Unlike *Murgia*, petitioners were not allowed to present their evidence in court — evidence which they assert would show that Missouri's selection of an age seventy retirement date excludes so few "unqualified" judges that it cannot be rationally related to the goal of insuring a vital, vigorous and healthy judiciary.[18] Given this failure of proof, the remaining ground upon which the Eighth Circuit relied in finding a rational basis is wholly irrational, arbitrary and capricious.

Thus, the Eighth Circuit's rational basis analysis is fatally flawed and violates the precedents of this Court's equal protection law.

[18] For an extensive discussion of the fallacy of decreased performance with increased age see Brief Amicus Curiae Of American Association of Retired Persons at nn.20-26, 29-38 and accompanying text, *Gregory v. Ashcroft*, No. 90-50, (U.S. *cert. granted* Nov. 26, 1990).

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court reverse the Eighth Circuit judgment and enter judgment for petitioners with respect to the ADEA claim on the grounds that petitioners are not "policymakers" or otherwise exempted from the definition of "employee" and hence are protected under the ADEA.

With respect to the equal protection claim, petitioners request that this Court vacate the Eighth Circuit judgment and remand, but for a determination only of whether the Missouri Constitution's Mandatory Retirement Provision excludes so few "unqualified" judges, from among the many qualified judges now being forced to retire, that it is not rationally related to Missouri's asserted purpose of insuring a judiciary which is both mentally and physically capable, vigorous and healthy.

DATED this 14th day of January, 1991.

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QUESTIONS PRESENTED

1. Does the Age Discrimination in Employment Act (ADEA) definition of "employee," 29 U.S.C. § 630(f), which exempts "appointee[s] on the policy making level," and "person[s] elected to public office," include under its coverage state-court judges selected pursuant to the Missouri Non-Partisan Court Plan?

2. If the ADEA does apply to Missouri state-court judges, does the application of that Act to a uniquely state function violate the Tenth Amendment?

3. Whether a state constitutional provision mandating the retirement of its judges at age 70 violates the Equal Protection Clause, or, rather, rationally furthers a legitimate state purpose.

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42 U.S.C. § 1983 23

Art. V, § 4, Const. of Mo. 20

Art. V, § 25, Const. of Mo. (1945) 31

Art. V, § 26, Const. of Mo. 32,44

Section 1.010, RSMo 1986 18

EEOC Opinion Letter to Rep. C. Claude Pepper, Apr. 7, 1987, reprinted in EEOC Compliance Man. (BNA) at N:1001, n.2 32

Op. Mo. Atty. Gen. No. 88 (1973) 33

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118 *Congressional Record* (1972) 24,25

Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 Wash. U. L. Q. 378 39

A. Corbin, *Corbin on Contracts*, § 1375 (1962) 18

Justice Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 535 (1947) 16

O. W. Holmes, Jr., *The Common Law* (1881) 21

L. Tribe, *American Constitutional Law*, § 6-25 (2d Ed. 1988) 28

Selected Writings of Benjamin Nathan Cardozo, "The Nature of Judicial Process," Margaret E. Hall (1947) 21

Judicial Retirement Plans, American Judicature Society 10

Judicial Selection in the United States: A Compendium of Provisions, American Judicature Society 10

Judicial Selection in the States' Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods, American Judicature Society 10

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Absent from the petitioner's brief is the complete text of Article V, Section 25(c)(1), which relates to the retention of judges selected under the Missouri Non-Partisan Court Plan.

> Each judge appointed pursuant to the provisions of sections 25(a)-(g) shall hold office for a term ending December thirty-first following the next general election after the expiration of twelve months in the office. Any judge holding office, or elected thereto, at the time of the election by which the provisions of sections 25(a)-(g) become applicable to his office, shall, unless removed for cause, remain in office for the term to which he would have been entitled had the provisions of sections 25(a)-(g) not become applicable to his office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any judge whose office is subject to the provisions of sections 25(a)-(g) may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed by any judge, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided. If such declaration is filed, his name shall be submitted at said next general election to the voters eligible to vote within the state if his office is that of judge of the supreme court, or within the geographic jurisdiction limit of the district where he serves if his office is that of a judge of the court of appeals, or within the circuit if his office is that of circuit judge, or within the county if his office is that of associate circuit judge on a separate judicial ballot, without party designation, reading:

"Shall Judge _____ (Here the name of the judge shall be inserted) of the _____ (Here the title of the court shall be inserted) be retained in office? Yes_____ No_____ (Mark an "X" in the box you prefer.)"

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 25(a); otherwise, said judge shall, unless removed for cause, remain in office for the number of years after December thirty-first following such election as is provided for the full term of such office, and at the expiration of each such term shall be eligible for retention in office by election in the manner here prescribed.

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and
ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT,
Governor of the State of Missouri,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This is a suit seeking an injunction against the Governor of the State of Missouri to prohibit him from exercising his constitutional responsibility to select successors to the petitioners, Missouri state-court judges, after they attain the mandatory retirement age of 70. The questions presented include consideration of whether judges appointed under the Missouri Non-Partisan Court Plan are employees covered by the Age Discrimination in Employment Act (ADEA) and whether the Equal Protection Clause prohibits a state from providing for the retirement of its judges at age 70. The district court dismissed the suit, holding that these petitioners are exempted from coverage under the

ADEA as "appointee[s] on the policy making level" and that Missouri had a rational basis for the mandatory retirement provision of its state Constitution. The court of appeals affirmed.

Selection, Retention, and Retirement of Judges in Missouri

In the majority of jurisdictions within the State of Missouri, circuit and associate circuit judges are selected by a vote of the people. The elections are partisan and political. § 478.010, RSMo 1986. With respect to specified jurisdictions and courts, some judges are appointed by the Governor (Art. V, § 25(a)), with the caveat that the people do vote on whether to retain such judges in office (Art. V, § 25(c)(1)). Petition, pp. 4, A-27. The judicial selections made by the Governor are from slates of candidates submitted by a constitutionally mandated judicial selection commission. The constitutional provisions outlined constitute what is known as the Missouri Non-Partisan Court Plan (hereinafter the "Missouri Plan"). Its provisions apply to the appellate courts of the State of Missouri and to the circuit courts in the St. Louis and Kansas City metropolitan areas. The petitioners are judges selected pursuant to the Missouri Plan. Judges Gregory and Nugent do not contend that those judges selected in partisan elections are employees covered by the ADEA.

Judges covered by the Missouri Plan are subject to elections. Art. V, § 25(c)(1), Petition, p. A-27. After a defined term, such a judge is required to file in the office of the Secretary of State of Missouri a declaration of candidacy for election to succeed himself if he desires to retain his judicial office. If such a declaration is filed, the question of whether to retain said judge is determined by a majority vote of the people at the next general election.

All Missouri state-court judges, whether initially selected pursuant to the Missouri Plan or initially elected, are subject to the provisions of Article V, Section 26, of the Missouri Constitution.

> (1) All judges other than municipal judges shall retire by the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.

> (2) All judges may retire at an earlier age authorized by law and may participate in a retirement plan provided by law.
>
> (3) Any retired judge, associate circuit judge, or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge, he shall have the same powers as an active judge.

Section 476.682, RSMo Supp. 1988, provides a mechanism whereby persons who serve as senior judges or commissioners, after the age of 70, will receive compensation at the same annual rate as judges under 70.

The Contentions of the Parties in the District Court

The supplemental complaint in this suit was filed on July 22, 1988. J.A. 3-9.[1] It is this supplemental complaint which was dismissed by the district court. The complaint was based upon the 1974 amendment to the ADEA, Pub. L. No. 93-259, § 28, 88 Stat. 55, which extended the Act to states as employers, and the 1986 amendment to the ADEA, Pub. L. No. 99-592, 100 Stat. 1342, which eliminated the upper age limit of the Act, making it apply, for the first time, to workers age 70 and above. The supplemental complaint alleged that judges selected pursuant to the Missouri Plan are employees under the ADEA, and that mandatory retirement at age 70 is in violation of the Law. The supplemental complaint also alleged that the mandatory retirement of judges was in violation of the Equal Protection Clause of the Fourteenth Amendment because it discriminated against judges in that other state officials are not required to retire at age 70. The complaint sought an injunction against the Governor from enforcing Article V, Section 26, of the Missouri Constitution.

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[1] The supplemental complaint was filed on behalf of four judges, three of whom were selected pursuant to the Missouri Plan and one of whom held office in a circuit where judges are selected in partisan elections. Only Judges Gregory and Nugent have pursued their case to this Court. Both Gregory and Nugent were selected pursuant to the Missouri Plan.

The Governor duly filed a motion to dismiss (J.A. 10) alleging that, as a matter of law, the Fourteenth Amendment did not apply to invalidate a state constitutional provision mandating the retirement of its judges and that state-court judges are not employees covered under the ADEA. In his suggestions and arguments before the district court, the Governor contended that judges selected pursuant to the Missouri Plan were both "appointee[s] on the policy making level" and "person[s] elected to public office." *Gregory v. Ashcroft*, U.S.D.Ct., E.D. Mo., Petition, p. A-20.

The Decision of the District Court

The district court granted the Governor's motion to dismiss. Petition, pp. A-17 through A-26. The trial court dismissed Count I of the supplemental complaint (the ADEA count) on the basis that judges selected pursuant to the Missouri Plan were excluded from the ADEA definition of "employee" because they were "appointee[s] on the policy making level." The district court dismissed the Fourteenth Amendment count on the complaint because it found that Missouri had a rational basis for the enactment of its constitutional provision respecting retirement of state-court judges, as represented by the Missouri Supreme Court case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978). The lower court also found that the expression of Missouri's highest court of rational bases for retiring state-court judges was consistent with existing precedent from other jurisdictions. Petition, p. A-25.

The Decision of the Court of Appeals

The United States Court of Appeals for the Eighth Circuit affirmed. 898 F.2d 598 (8th Cir. 1990), Petition, pages A-1 to A-16. The Eighth Circuit first noted that the tenure of state -court judges "is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." Petition, at page A-4. Because the application of the ADEA to state court judges is of such consequence and import, the Eighth Circuit determined that it would not find the ADEA to be in conflict with Missouri's constitutional provision mandating the retirement of state court judges unless it found that

"Congress clearly has expressed its intention to bring state court judges into the ambit of the federal statute." Petition, at page A-4. The Eighth Circuit failed to find an intent by Congress to preempt, via the ADEA, state law pertaining to the retirement of judges. To the contrary, the Eighth Circuit found the plain language of 29 U.S.C. § 630(f), which exempts "appointee[s] on the policy making level," as evidencing a clear-cut congressional intent to exclude state court judges, who do make policy, from the coverage of the Act. Petition, at pages A-6 to A-7. The Eighth Circuit did not find applicable legislative history to suggest a contrary result. Petition, at pages A-8 to A-9.

The Eighth Circuit noted that, in Missouri, some state-court judges are appointed by the Governor, and subjected to election for retention by the people, and some state-court judges are elected by popular vote. The irrationality of treating those judges initially appointed by the Governor as covered, under the ADEA, and treating judges initially elected by popular vote as exempted was obvious to the appeals court.

The Eighth Circuit also rejected the petitioners' contention that Missouri's constitutional provision pertaining to the retirement of judges was in violation of the equal protection clause of the Fourteenth Amendment. The Eighth Circuit found that the rational basis test was correctly applied by the district court. Petition, at pages A-13 to A-14. Further, the lower court found that the Missouri Supreme Court had articulated sufficiently rational bases for the mandatory retirement provision in the case of *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978). Petition, at page A-15. The Eighth Circuit went on to find that the rational bases articulated by the Missouri Supreme Court were consistent with decisions on the same issue from other jurisdictions.

SUMMARY OF THE ARGUMENT

At issue in this case is whether a state constitutional provision mandating the retirement of state-court judges at age 70 is preempted by the ADEA or violates the Equal Protection Clause. If the ADEA is construed to preempt a state provision providing for the qualifications of its judges, it will be necessary to determine whether Congress acted

in excess of its authority under the Tenth Amendment. This is a matter of some concern to the states, because it involves an alleged federal intrusion into state autonomy. Thirty-eight states and the District of Columbia provide for the mandatory retirement of state-court judges or for the reduction or forfeiture of benefits of judges who do not retire.

1. Exempted from the ADEA statutory definition of "employee" are "appointee[s] on the policy making level." In Missouri, appellate court judges and trial judges in St. Louis and Kansas City are chosen pursuant to a merit selection process, which includes initial appointment by the Governor and subsequent retention elections. All other trial court judges are chosen in partisan political elections. Unless Missouri Plan judges are exempted as policy makers, the ADEA can be construed to prohibit the mandatory retirement of state supreme court judges, state appeals court judges, and metropolitan area trial judges, but to allow the mandatory retirement of elected trial judges *and* their personal appointees. "Thus, an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA, while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed." *Gregory v. Ashcroft*, 898 F.2d 598 (Petition, p. A-10). Further, states which choose to select their judges by initial election would be immune from the ADEA, but states which choose a merit selection process for some or all of their judges, like Missouri, would have their autonomy with respect to the qualifications of judicial officers preempted. The policy makers exemption should be rationally read to apply to all branches of state government, including the judicial branch. The language of the exemptions from the definition of "employee," 29 U.S.C. 630(f), does not, on its face, purport to apply to the executive and legislative branches only. Rather, the language demonstrates that Congress intended two categories: "policy makers, who need not be advisors; and advisors, who need not be policy makers." *EEOC v. Massachusetts*, 858 F.2d 51, 56 (1st Cir. 1988).

The exemption applies to state-court judges because judges do make policy. The judiciary, which has authority to interpret, clarify, and invalidate the rules of the executive branch and the laws of the legislative branch, is a powerful policy making force significantly

affecting the everyday lives of Missourians. The common law of Missouri, which is a culmination of innumerable judicial decisions of individual judges, is as compelling a body of public policy, and as binding on the citizens of Missouri, as all the statutes passed by Missouri's legislatures and all the regulations promulgated by Missouri's executives. "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . . ." O. W. Holmes, Jr., *The Common Law*, at 35-36 (1881).

Application of the ADEA to state-court judges and to mandatory retirement provisions for same, was never considered by Congress in enacting the 1974 and 1986 amendments to the ADEA. The petitioners rely upon legislative history attendant to Title VII of the Civil Rights Act of 1964. Reliance on such legislative history is a tenuous basis on which to construe the enactments of later Congresses. Nevertheless, Title VII legislative history suggests that judges should be exempt from ADEA coverage. Title VII senatorial debates demonstrate that Congress was concerned that the highest levels of all branches of state government, including the judicial, be insulated from federal intrusion. 118 *Congressional Record* at 1677, 1838 (1972).

The preemption of state constitutional provisions mandating the retirement of judges should require a "clear statement of congressional intent." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). There is no clear statement in the language of the ADEA, nor in such legislative history as is available, that Congress intended to deprive the people of the State of Missouri of the right to make judgments about the qualifications of their judges. The states have the power to establish the qualifications for state judicial positions. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). It should not be presumed that Congress intended to preempt such right unless the congressional purpose to do so is clear and manifest. *California v. ARC America Corp.*, 491 U.S. ___, 109 S.Ct. 1661, 1665 (1989).

There are public policy considerations which support a finding that appointed state judges are exempt from the ADEA. Such a result would avoid a significant intrusion upon state sovereignty; remove the

federal government from participation in state controversies about whether judges should be appointed or elected (if Missouri Plan judges are not exempt from the ADEA, it must be assumed that Missouri will consider electing all its judges, and that other states which now use merit selection systems will revert to the outmoded practice of electing judges); and avoid consideration of the important Tenth Amendment issues which would ensue from preemption of state constitutions.

2. Title 29 U.S.C. § 630(f) provides another applicable exemption for Missouri Plan judges, "person[s] elected to public office." Missouri Plan judges, after initial appointment by the Governor from nominations from nonpartisan judicial commissions, must run in retention elections in which the people determine whether those judges will remain in office. The EEOC has taken the official position that such a process results in elected judges. Whether Missouri Plan judges are elected or appointed is a matter which should be determined by reference to Missouri law. Missouri law provides that they are elected officials. Op. Mo. Atty. Gen. No. 88 (1973).

3. If the effect of the 1974 and 1986 amendments to the ADEA is to preempt state mandatory retirement provisions for judges, the Tenth Amendment precludes that result. There is no indication that Congress intended, or considered, the extension of ADEA coverage to appointed state-court judges. Given the lack of a "clear statement," it is obvious that the political processes referred to in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), have been defective in protecting the states from an important incursion upon their sovereignty. After *Garcia*, the federal judiciary should retain the obligation of reviewing federal assaults on the integrity of the states to determine whether the national political process has worked.

If the ADEA has preempted the right of the states to determine the qualifications of their judges, this might be an appropriate occasion upon which to review the validity of *Garcia* and *EEOC v. Wyoming*, 460 U.S. 226 (1983). Congress should not be "the sole judge of the limit . . . [its] own power." *Garcia, supra*, 469 U.S. at 567 (Powell, J., dissenting). It might now be the time to determine whether Chief Justice Rehnquist and Justice O'Connor were correct in predicting that

Garcia had a limited life span. *Garcia, id.* at 589 (O'Connor, J., dissenting).

4. Petitioners also contend that the mandatory retirement of state-court judges is in violation of the equal protection clause, but the petitioners do not now and have never cited a single case in which a state mandatory retirement provisions was invalidated under the Fourteenth Amendment. *Gregory v. Ashcroft, supra*. Petition, p. A-13. This Court has never found old age to be a suspect class. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*). There is no fundamental right to employment as a state judge. Therefore, Missouri need only demonstrate mandatory retirement of judges is a rational means to accomplish a legitimate state purpose. *San Antonio School District v. Rodriquez*, 411 U.S. 1 (1973). There are numerous cases considering and validating various rational bases for the retirement of state judges. The precedent is unanimous: the rational bases relied upon to require the retirement of judges could reasonably be conceived as true by Missourians when ratifying their state Constitution. *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

ARGUMENT

In this case, the Court is called upon to determine whether it is permissible for a state to provide, in its constitution, for the retirement of its judges at age 70. This is a matter of great importance to the several states, and could have a significant impact on the nature and extent of their sovereignty. The majority of the states have a specific, vested interest in the outcome of this litigation. Based upon the best and most recent published figures available, thirty-six states and the District of Columbia presently provide for the mandatory retirement of all state-court judges. Two states do not require *mandatory* retirement, but provide for the reduction or forfeiture of benefits after a judge has attained a certain age without retiring.[2]

The first question which this Court must determine is whether the ADEA prohibits a state from mandatorily retiring its appointed judges or its judges chosen pursuant to a merit selection process. It does not if such judges are "appointee[s] on the policy making level." The resolution of this question is of considerable significance to those twenty-nine states and the District of Columbia that appoint or apply a merit selection system to at least some of their state-court judges.[3]

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[2] *Judicial Retirement Plans*, Timothy Pyne, updated by Thomas F. Sammons, American Judicature Society, April 16, 1985. The thirty-six states which provide for mandatory retirement of judges inlclude Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. The twelve states which do not provide for mandatory retirement of judges include Delaware, Florida, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, Tennessee, West Virginia, and Wisconsin. California does not mandate retirement, but provides for diminished benefits after age 70. Maine does not mandate retirement, but provides for the forfeiture of benefits after age 71.

[3] *Judicial Selection in the United States: A Compendium of Provisions*, Larry Berkson, Scott Beller, and Michele Grimaldi, American Judicature Society; *Judicial Selection in the States' Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods*, American Judicature

(Footnote 3 continued on next page)

Whether or not judges like the petitioners are exempted from coverage under the ADEA as policy makers is the subject of Point I of this Brief.

In Point II, we explain why judges chosen under a merit selection process, like the Missouri Plan, are exempted from coverage under the ADEA as "person[s] elected to public office." Again, this is an extremely important issue to those twenty-three jurisdictions which select some or all of their judges pursuant to a merit process analogous to the Missouri Plan.[4]

If the ADEA applies to petitioners, as employees, this attempted application violates the Tenth Amendment under existing case law, but if that is not clear under existing precedent, then *Garcia* and *EEOC v. Wyoming* should be reexamined. Point III of the Brief addresses this subject.

In Point IV, we submit that a state has rational bases for establishing a mandatory retirement provision for state-court judges, and that the mandatory retirement provision of the Missouri Constitution is a reasonable and logical means by which to effectuate those rational and legitimate state interests.

(Footnote 3 continued)

Society, 1986, Revised 2/7/89. Those states which appoint all their judges via merit selection process include Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Utah, Vermont, and Wyoming. Those states which have a merit selection process for some judges and elect others include Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee. Those states in which either the governor or the legislature appoints judges without a merit process include California, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, and Virginia. Those states which choose their judges in partisan elections include Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia. Those states which select their judges in nonpartisan elections include Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin.

[4] Please refer to footnote 3, *supra*.

I.

STATE COURT JUDGES SELECTED PURSUANT TO THE MISSOURI PLAN ARE EXEMPTED FROM COVERAGE UNDER THE ADEA AS "APPOINTEE[S] ON THE POLICY MAKING LEVEL."

A. The Clear Language of the Policy Making Exemption Evidences an Intent to Exclude Appointed Judges Because Judges Do Make Policy.

Specifically at issue in the ADEA attack on Missouri's constitutional provision mandating the retirement of its judges is the statutory definition of "employee."

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff *or an appointee on the policy making level* or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (emphasis added). This definition of "employee" was included in the 1974 amendments to the ADEA, amendments which also expanded the definition of "employer" to apply to the states and their political subdivisions. 29 U.S.C. § 630(b), Pub. L. 93-258 § 28(a), 88 Stat. 74. No ADEA challenge was mounted against mandatory retirement provisions for state-court judges until the upper age limit of the ADEA was eliminated. The prohibitions of the ADEA originally applied only to individuals who were at least 40, but less than 65, years of age. This maximum age ceiling was increased to age 70 in 1978, Pub. L. 95-256 § 3(a), and was eliminated in 1986, Pub. L. 99-272 § 2(c), effective January 1, 1987.

After the 1986 amendment, numerous courts have addressed the application of the ADEA to the mandatory retirement of state-court

judges.[5] Including the district court and the court of appeals in this case, the majority of the courts considering the issue have found that the proscriptions on age discrimination included within the ADEA are inapplicable to state-court judges. *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *In re Stout*, 521 Pa. 571, 559 A.2d 489 (1989); *Apkin v. Treasurer and Receiver-General*, 401 Mass. 427, 517 N.E.2d 141 (1988); and *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988).

Exempted from the ADEA are "appointee[s] on the policy making level." 29 U.S.C. § 630(f). If judges selected pursuant to the Missouri Plan are indeed "appointee[s],"[6] they fall within the clear language of the exception provided for by Congress. For the majority of jurisdictions in Missouri, state judges are selected in partisan elections. The remainder of Missouri's judges, members of the Supreme Court and the courts of appeal and circuit and associate circuit judges in our State's two major metropolitan areas, are chosen pursuant to the Missouri Plan, which includes an initial appointment by the Governor. The anomaly of treating Missouri's elected judges as not covered under the ADEA, and, therefore, subject to mandatory retirement, while treating Missouri Plan judges as covered under the ADEA, in which case their mandatory retirement would be preempted by federal law, was duly noted by the Eighth Circuit.

> Thus, an employee, such as a law clerk hired by an elected judge to be on his personal staff, would be exempt from the ADEA, while the highest ranking judges in Missouri would be covered by the Act simply because they are appointed. We conclude that Congress's designation of "appointee[s] on the policy making level" as an exemption to the ADEA definition of "employee"

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[5] The only courts which have invalidated state mandatory retirement provisions under the ADEA are the Second Circuit in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990); the Eastern District of Virginia in *Schlitz v. Virginia*, 681 F. Supp. 330 (E.D. Va. 1988); and the Vermont District Court in *EEOC v. Vermont*, 717 F. Supp. 261 (D. Vt. 1989).

[6] See Point II, *infra*.

> manifests an interest in excluding persons entrusted with extensive decision making authority and discretionary power from the protection of the Act. There is no rational basis for deeming this interest to be more compelling in the executive and legislative branches than in the judiciary and we refuse to embrace such an inconsistent result. . . .
>
> In Missouri, where the majority of state judges are elected, the rationality of not excluding appointed judges from the ADEA as "appointee[s] on the policy making level" is even more pronounced. There is simply no principled basis for treating Missouri's appointed judges differently from its elected judges for purposes of the ADEA.

Gregory v. Ashcroft, 898 F.2d 598, 603 (Petition, pp. A-10, A-11). In accord, see *Apkin v. Treasurer and Receiver-General*, 517 N.E.2d 141, 145 (Mass. 1988) ("There is no logical or rational reason why elected judges of the Supreme Court of Washington, for example, may be required by State law to retire at a given age and Justices of this court may not."); *EEOC v. Massachusetts*, 680 F. Supp. 455, 462 (D. Mass. 1988) (such an interpretation of the ADEA would result in "a line jumping sharply up or down as to levels of authority and levels of discretionary performance, depending on whether one served in an elective office (in which case even lower tier officers would be excepted in all three branches of government) or an appointed office (in which case persons serving in discretionary or advisory positions would be covered in the judicial branch and excepted in the other two branches)); *EEOC v. State of Illinois*, 721 F. Supp. 156, 159 (N.D. Ill. 1989) ("There is no principled basis, either in the language of the statute or an expressed legislative intent, to treat appointed judges differently from elected judges.").

The petitioners contend that the "appointee[s] on the policy making level" exemption does not apply to the judicial branch of government because the context suggests an intended application "only to persons who advise or work closely with the elected official that chose the appointee." Brief of Petitioners, pp. 17-18. Such an interpretation is contrary to the plain meaning of the written words. The exemptions from "employee" status within 29 U.S.C. § 630(f) include:

> 1. Any person elected to public office;
>
> 2. Any person chosen by an elected official to be on such official's personal staff;
>
> 3. An appointee on the policy making level; or
>
> 4. An immediate advisor with respect to the exercise of the constitutional or legal powers of an office.

The interpretation suggested by the petitioners would make the third exception entirely redundant. They suggest that all four exemptions apply only to the executive, and, perhaps, the legislative, branches of government.[7] If Congress meant only to exclude appointees having a close working relationship with elected officials, the language Congress chose does not say that. Furthermore, the third exemption does not say appointed policy makers, but appointees "on the policy making level."

Most state-court judges in Missouri are elected by the people. The petitioners do not suggest that such judges are covered by the ADEA. If the interpretation of the policy making exemption by the petitioners is correct, however, elected circuit and associate circuit judges in Missouri, together with persons chosen to be on the personal staffs of such judges, including docket clerks, law clerks, court reporters, and bailiffs, would apparently be exempted from coverage under the ADEA, while judges initially appointed by the Governor to the circuit bench in Missouri's major metropolitan areas and to the appellate bench would be covered. That is, the most powerful policy makers among all Missouri state-court judges, judges on the Missouri Supreme Court and Missouri appellate courts, are covered by the ADEA, but the docket clerk of the associate circuit judge in Missouri's smallest rural judicial circuit would be exempted from coverage.

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[7] It must be assumed that Congress knew that the majority of state-court judges are elected and that the first exemption applied to the judicial branch. Therefore, the third exemption is not "sandwiched" within a list applying only to the executive and perhaps legislative branches.

We agree with the First Circuit that the explicit language used by Congress in § 630(f) demonstrates that "Congress intended two categories: policy makers, who need not be advisors; and advisors, who need not be policy makers." *EEOC v. Massachusetts*, 858 F.2d at 56.

The logical extension of the petitioner's interpretation demonstrates how unlikely it is that Congress intended the result petitioners proffer: The people of Missouri, when enacting a state Constitution, intended that nonappellate court judges outside major metropolitan areas be policy makers and that appellate judges and metropolitan judges not be policy makers.

> If the policy making level exception is read in this limited manner, none of the four categories of exemptions from the coverage of the ADEA would apply to employees in the judicial branch in those states where judges are appointed. We believe it is highly unlikely that the Congress intended this result, and the implausibility of the total exclusion of the appointed members of the state's judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, lays heavily against such a narrow reading of the policy making level exception.

Gregory v. Ashcroft, 898 F.2d 598, 602 (Petition, at p. A-8).

"Though we may not end with the words in construing a disputed statute, one certainly begins there."[8] The language of the exemption at issue should be read to exclude appointed state-court judges because judges clearly are *policy makers*. The conclusion of the Eighth Circuit on the matter of judges as policy makers is compelling:

> The reality of judging is that it is not always — and perhaps not even usually — merely a matter of mechanically applying settled, unambiguous principles of law to specific fact patterns as they arise .... In keeping with our common law tradition, judges

[8] Justice Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 535 (1947).

> in deciding the particular cases before them may establish either general standards or specific rules of decision that may be relied upon in the future by other judges, by other branches of government, by attorneys and other professionals in advising their clients, and by members of the public in planning their affairs, either individually or in organizations of every kind. Whatever the judicial philosophy of the particular judge, and whether he views his proper role as broad or narrow, his decisions — some of them at least — necessarily will involve issues previously unsettled and thus will create law. Within the boundaries established by settled law, and mindful that it is not for the judiciary to usurp the functions of other branches of government, judges must exercise the same sort of discretion in decision making, temper their rulings with the same sort of self restraint, and engage in the same sort of thoughtful judgment that is required of "appointee[s] on the policy making level" in the executive and legislative branches.

Gregory v. Ashcroft, 898 F.2d 598, 601 (Petition, pp. A-6, A-7). The decision of the First Circuit on this issue is also persuasive.

> While judges have at times been thought to act as somewhat mechanized law-and-fact processors, scientifically applying settled principles of law to established fact patterns, that image hardly meshes with the reality of judging.

* * *

This judicial type of policy making is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decision making, and the same kind of forward thinking that is required of "appointee[s] on the policy making level" in those other two branches of government. And it certainly concerns state government to a similar degree.

EEOC v. Massachusetts, 858 F.2d 52, 54-55 (1st Cir. 1988).[9]

It is submitted that courts, and individual judges, who have absolute authority to interpret, clarify, and invalidate the rules, regulations, and policy statements of the executive branch and the statutes enacted by the legislative branch are, if anything, more powerful makers of policy than are members of the other two branches of government. Missouri is a common law state. The very first Missouri statutory section embraces the common law in effect in England prior to the fourth year of the reign of James the First. Section 1.010, RSMo 1986. It has been said that "[o]ur entire body of what is described as the 'common law' is the result of innumerable court decisions based upon the judicial notions of sound social policy and human welfare." 6A A. Corbin, *Corbin on Contracts*, § 1375 at 18 (1962). The present common law of Missouri is a much larger, more complex and vastly different expression of public policy than was true at the time Missouri attained statehood. The vast body of policy reflected in our present common law is, for the most part, the result of individual decisions by state-court judges, and in every respect is as compelling, binding on our citizens, and impressive as the total number of statutes passed by all of Missouri's legislatures and much more comprehensive than any body of policy promulgated by the executive branch. "The common law is not a brooding omnipresence in the sky," wrote Justice Holmes, "but the articulate voice of some sovereign or quasi-sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917). Missouri is such a sovereign and, in their respective spheres, both its legislators and its judges are called upon to supply the "articulate voice" of its common law. In terms both practical and historical, the

[9] The conclusion of the Second Circuit that judges are not policy makers is less persuasive than the decisions of the Eighth and First Circuits on that issue.

> Though such a judicial act may thus state or clarify a policy, any such statement or clarification is merely ancillary to the resolution of a particular controversy between parties.

EEOC v. Vermont, 904 F.2d 794, 800-801 (2d Cir. 1990). It is logical to assume that one who states or clarifies policy is, in fact, a policy maker.

judiciary is much more regularly assigned to attend the common law's development.

Judicial decision making, then, is an expression of public policy, no less, and perhaps more, compelling than the modes of expression available to the legislative and executive branches of government. To suggest, as the petitioners do,[10] that the policy recommendations made by the bureaucrats who are personally appointed to the staff of an executive are somehow a higher form of action than the policy interpretations and laws created by the judicial branch is untrue and unrealistic. The courts of Missouri do exercise their decision making power to make policy. In *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. banc 1977), the Missouri Supreme Court abrogated sovereign immunity. In *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983), the Missouri Supreme Court effected a revolution in tort law by adopting a system of comparative negligence to replace doctrines of contributory fault and "last clear chance." In *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. Banc 1988), *aff'd* ___ U.S. ___ (1990), the Missouri Supreme Court established a public policy of this State respecting the treatment and withdrawal of treatment of comatose patients. A list of the public policies effectuated by decisions of the Missouri Supreme Court could proceed indefinitely. The lower state courts also make policy with respect to almost every decision they render. It is difficult, for example, to formulate a more policy-intensive process than fashioning a criminal sentence to fit a specific crime. If the law clearly mandated a given result based on the facts in every given case, computers could occupy the bench.

Missouri courts also have policy making responsibility outside the realm of judicial decision making. The Missouri Supreme Court makes rules establishing legal procedures and practice, and governing the professional conduct of the Missouri judiciary and the Missouri Bar. The Missouri Court of Appeals makes rules establishing procedures and practice. The Chief Justice of the Missouri Supreme Court, the Chief Judges of the divisions of the Court of Appeals, and the

[10] Brief of Petitioner, pp. 22-24.

Presiding Judges in the circuit courts all have general supervisory powers. Art. V, § 4, Constitution of Missouri. The state circuit courts, trial level courts of general jurisdiction, establish local rules of practice and have disciplinary power over practicing attorneys.

Implicit in the arguments of petitioners and the Second Circuit[11] is the suggestion that judges make law, which is entirely different from making policy. Apparently, the extension of that argument would require the conclusion that legislators do not make policy because they enact laws. Bureaucrats who serve on the personal staffs of elected officials are far less influential in the formulation of law and policy which guide the lives of individuals in the State of Missouri than are our judicial officers. In a sense, judges are superior as policy makers to both the executive and legislative branches of government. Both laws passed by the legislature and policies adopted by the executive are subject to review and interpretation and invalidation by the judiciary. The judges of this State have, and regularly exercise, the power to review and veto the policy decisions made by high level bureaucrats and the law and policy enacted by the Missouri Legislature. The Missouri state judiciary probably has a more powerful and lasting effect upon the people than does any elected governor or session of the general assembly. The only authority to which state-court judges must answer is embodied in the higher appellate courts. Each state-court judge, once appointed or elected, is expected to act independently. Not only is each Missouri state-court judge a separate and independent judicial officer, but each is at the very top of his or her policy making chain of command.

The process of judging was understood by Mr. Justice Cardozo to include policy making.

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make it precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but has had a hand in the making.

Selected Writings of Benjamin Nathan Cardozo, "The Nature of the Judicial Process," Margaret E. Hall, p. 108-109 (1947).[12]

[11] *EEOC v. Vermont, supra.*

B. Available Legislative History Does Not Suggest that Congress Intended the ADEA to Apply to Appointed State-Court Judges.

When Congress amended the ADEA in 1974, to amend the definition of "employer" to include states and to amend the definition of "employee" to include the exemptions at issue in this case, and later amended the Act in 1986, to remove the age cap which made disputes about mandatory retirement provisions for state-court judges possible, no contemporaneous legislative history was produced which would assist the court in determining whether state judges are "appointee[s]

[12] Holmes explained the process of judging as eloquently:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.

O. W. Holmes, Jr., *The Common Law*, at 35-36 (1881).

on the policy making level."[13] Implicitly acknowledging the lack of legislative history associated with the amendments that made this controversy possible, the petitioners have attempted to find support for their position in the legislative history attendant to passage of amendments to Title VII of the Civil Rights Act of 1964. The Second Circuit did the same. *EEOC v. Vermont, supra*, 904 F.2d at 798.[14]

The best determinant of congressional intent is the language of a law itself. Legislative history should always be a secondary source. Even more tenuous is the application of legislative history produced in association with a 1972 law to determine the intent of Congress in passing 1974 and 1986 amendments to the ADEA. Furthermore, Title VII was enacted by Congress pursuant to its power under the Fourteenth Amendment. H. Rep. No. 92-238, and 92d Cong., 2d Sess., *reprinted in* 1972, U.S. Code Cong. & Admin. News 2137, 2153, 2154. Conversely, the 1974 amendments to the ADEA, which extended the Act to states and exempted policy makers, was passed in association with the Fair Labor Standards Amendments of 1974 pursuant to the power conferred upon Congress by the Commerce Clause. In addition, Title VII legislative history should not be used to narrow ADEA exemp-

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[13] With respect to the 1974 enactment of § 630(f), "[i]t is simply not a credible inference that a majority of the Members of Congress, voting on this matter, would have formed this intent and acted upon it, without one word of comment about it in the legislative history. For that to have happened, the issue would have had to be either noncontroversial or inconsequential. It was, in fact, neither." *EEOC v. Commonwealth of Massachusetts, supra*, 680 F. Supp. at 464. Further, "[i]t seems clear that Congress did not even consider the consequences of the 1986 amendment on the state judiciary." *Apkin v. Treasurer and Receiver-General, supra*, 401 Mass. at 435, 517 N.E.2d at 146.

[14] In support of the proposition that Title VII legislative history should be used to divine the intent of Congress in exempting policy makers from coverage under the ADEA, the petitioners cite *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979), and *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). These cases provide very meager support for petitioners' position. In *Oscar Mayer*, the Court found a procedural prerequisite to filing a Title VII claim also applicable to an ADEA claim consistent with *precedent* interpreting the original language. In *Lorillard*, a case involving the availability of jury trials in ADEA proceedings, the Court found that Congress intended different results on that issue in passing Title VII and the ADEA.

tions. The two laws involve fundamentally different impacts. A state lacks any sovereign right to racial or sexual discrimination in employment. The Thirteenth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 had already established that proposition. The ADEA did not merely implement existing rights. The Thirteenth and Fourteenth Amendments and § 1983 are not applicable to issues of age. The difficulty of applying Title VII legislative history to the ADEA should be clear. This would be a much different case if Missouri disqualified persons from serving as judges based upon their race, sex, or national origin.

Yet, the 1972 amendments to Title VII suggest that Congress intended to insulate the states from Title VII liability with respect to elected officials and policy makers. Title VII legislative history does not suggest that Congress intended to distinguish between appointed and elected state-court judges. The petitioners rely upon a quotation from the *Congressional Record*. Brief of Petitioners, pp. 18-19. The petitioners' brief accurately quotes the *Congressional Record*, but does not quote the conference report itself. Because the conference report "represents the final statement of terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of congressional intent . . . ." *Davis v. Lukhard*, 788 F.2d 973, 991 (4th Cir. 1986), *cert. denied*, 479 U.S. 868 (1986). The actual report states:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policy making positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees' intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted.

H. Conf. Rep. No. 92-899 and S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess., *reprinted in* 1972, U. S. Code Cong. & Admin. News 2179, 2180. The conference report itself does not limit "departments or agencies" of a state to any one branch of government, nor are "policy

making positions" limited to those who advise elected officials. The exemption was intended to extend to "persons with comparable responsibilities at the local level," making it highly unlikely that Congress intended to exempt a mayoral appointee to the position of parks and recreation director, but not to exempt state judges appointed to constitutional courts of general jurisdiction. Furthermore, the language "such as cabinet officers" is illustrative, not restrictive. As the First Circuit ruled:

> In addition, the narrow construction mentioned by the conferees, on which the appellant's brief relies so heavily, is clearly intended to limit the reach of the exception down the chain of command, and not so much across agencies or departments. This is evident from the very language of the conferees, who place no restrictions on the number of agencies or departments covered, but limited the positions covered to those at the highest levels. Clearly, each judge is a separate and independent judicial officer, is at the very top of his particular "policy making" chain of command, responding, if we can call it that, only to a higher appellate court.

Equal Employment Opportunity Commission v. Commonwealth of Massachusetts, supra, 858 F.2d at 56.

The petitioners also cite senatorial debates on the Title VII exemptions. It is important to note that these debates occurred at a point in time when the policy makers exception was not included within the proposed amendment. That additional exemption, which is the subject of this case, was added later during House and Senate conferences. 118 *Congressional Record* at 7567 (1972). Nevertheless, those senatorial debates demonstrate that the Senate was concerned with all branches of state government, including the judiciary. Senator Ervin was concerned that extension of the ADEA to states should include exceptions.

> There is not even an exception in the bill to the effect that the EEOC will not have jurisdiction over the Governor of a State or the Lieutenant-Governor of a State, or both; statewide election officials; State judges, whether they are elected or appointed to office; clerks of superior courts of counties and their assistants; sheriffs of counties or their assistants; and the chiefs of police in municipalities. The bill would give the EEOC jurisdiction, even, over members of school boards, certainly where they are appointed.

118 *Congressional Record* at 1677 (1972). He asked whether the bill included "the supreme court justices of the State" and the "other men who exercise executive and judicial power." *Id.* at 1811. He further asked whether "the bill in its present form would give Federal district courts the ultimate power to compel States and subdivisions of States to yield to their decrees with respect to the employment of persons who exercise the legislative, executive, and judicial powers of the States and political subdivisions of States?"[15] *Id.* at 1838.

Senator Taft, who was a member of the Senate Labor and Public Welfare Committee which had reported out the bill, stated that he did not intend to include elected officers, and that he "would be quite willing to go considerably further and perhaps to cover other personnel as well, and to cover those at the top decision making levels in the executive and judicial branches as well." *Id.* It was after the colloquys between Senator Ervin and Senator Taft that the first exemptions to the definition of "employee" were added to the Senate bill. Amendment No. 888, *id.* at 4095. That amendment did not contain the policy making exemption. The final version of the law, containing the policy making exception, was added in conference. As Congressman Erlenborn, one of the House Managers, stated:

> In the other body, an exemption was made for elected officials and immediate legal advisors. In the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policy making positions.

118 *Congressional Record* at 7567.

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[15] Senator Ervin represented North Carolina, a state which elects all its judges. *See* fn. 3, *supra*. He had no reason to consider whether appointive exceptions applied to judges.

It is clear that in amending Title VII, which deals with invidious race, sex, and national origin discrimination, Congress was concerned that states be insulated from liability with respect to their highest officials in all branches of government.

There is a different, collateral reason to believe that Congress did not intend to prohibit the states from requiring the mandatory retirement of their judges. There are maximum age limits of 64 for appointment and 70 for retention for chief judges of both the U. S. Court of Appeals and district courts. 28 U.S.C. §§ 45(a)(1)(A) and (2)(C) and §§ 136(a)(1)(A) and (2)(C).

There is no evidence in any available legislative history to suggest that Congress even *considered* whether the prohibitions of the ADEA would apply to appointed state-court judges, much less that Congress *intended* such a result. As discussed in the next subsection of this brief, in order for Missouri's constitutional provision for mandatory retirement of state judges to be preempted by federal law, a clear statement of congressional intent to effect such a result must exist.

C. Federal Preemption of a State Constitutional Provision Should Not be Presumed Absent a Clear Statement of Congressional Intent.

> Without question, the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very closely to the heart of state sovereignty.

EEOC v. Massachusetts, supra, 858 F.2d at 54. In this case, the Eighth Circuit noted that the tenure of state-court judges "is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." *Gregory v. Ashcroft, supra*, at 600, Petition, p. A-4. Because the application of the ADEA to state-court judges is of such consequence and import, the Eighth Circuit determined that it would not find the ADEA to be in conflict with Missouri's constitutional provision mandating the retirement of state-court judges

unless it found that "Congress clearly has expressed its intention to bring state-court judges into the ambit of the federal statute." *Id.* at A-4.

The citizens of the states have the right to make judgments about the qualifications of their judges and those of Missouri have done so in their Constitution. There is no clear statement in the language of the ADEA, nor in such legislative history as is available, that Congress intended to deprive them of that right. When Congress wishes to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

In *Delmuth v. Muth*, 491 U.S. ___, 109 S.Ct. 2397, 2401-2402 (1989), this Court stated:

> Rather, the salient point in our review is that it cannot be said with perfect confidence that Congress in fact intended in 1975 to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area.

The Court went even further, requiring clear evidence of congressional intent in the text of a statute and finding legislative history generally irrelevant to the inquiry whether Congress intended to abrogate the Eleventh Amendment. *Id.* at 2401. *Delmuth* is an Eleventh Amendment case, but the requirement of a clear statement extends to the facts in this proceeding as well.

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon* [citation omitted]; *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to preempt the historic powers of the states [citations omitted], or if it intends to impose a condition on the grant of federal money

> [citations omitted]. "In traditionally sensitive areas, such a legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Will v. Michigan Department of State Police, 491 U.S. ___, 109 S.Ct. 2304, 2308-2309 (1989).

"Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Thayer*, 143 U.S. 135, 161 (1892).

> And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."

Sugarman v. Dougall, 413 U.S. 634, 647 (1973). When Congress acts in an area traditionally occupied by the states, it must be assumed that the historic powers of the state are not superseded unless the congressional purpose to do so is clear and manifest. *California v. ARC America Corp.*, 491 U.S. ___, 109 S.Ct. 1661, 1665 (1989). It is a "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).[16] Congress has made no clear statement that it intended to preempt state constitutional provisions providing for the retirement of state-court judges. The very most that can be said on behalf of petitioners' position is that Congress may never have considered appointed state-court judges in association with the ADEA. The exercise of federal supremacy should not be lightly presumed. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981).

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[16] Professor Tribe, not a champion of federalism or limitations on federal power, understands the special principles applied to preemption, and that there is an "overriding reluctance to infer preemption in ambiguous cases." L. Tribe, *American Constitutional Law*, § 6-25, at 479 (2d Ed. 1988).

D. Exemption of Appointed State-Court Judges from Coverage Under the ADEA is Consistent with Sound Principles of Public Policy.

There are several important public policy considerations which mitigate against the petitioners' interpretation of the "appointee[s] on the policy making level" exemption. In the first place, as discussed *supra*, the matter of qualifications, tenure, and retirement of state-court judges is traditionally a state prerogative and should remain so. The people of the State of Missouri have chosen to provide for the mandatory retirement of state-court judges in their Constitution. The constitutional provision for the retirement of state-court judges was submitted to a vote of the people and was passed overwhelmingly. If the Court should approve of the petitioners' position, it would sanction a significant intrusion upon state sovereignty. The principles of federalism should preclude such a result.

Second, a slight majority of states now choose to select some or all of their judges by various merit selection processes, all of which include an element of appointment.[17] In Missouri, appellate judges and trial judges in Kansas City and St. Louis are selected this way, while judges in outstate Missouri are selected by partisan election. If the ADEA is construed to apply to judges selected pursuant to the Missouri Plan, there will be a very strong incentive for the State to change its selection process to provide for the partisan election of all its judges.[18] It is unlikely that Congress intended to dictate to the states whether judges should be elected as opposed to appointed. Nevertheless, a decision extending the coverage of the ADEA to appointed state-court judges would have that very effect.

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[17] See footnote 3.

[18] Shortly after the American Judicature Society was founded, its first director of research, Albert M. Kales, developed a plan for the merit selection of judges. In 1940, Missouri became the first state to adopt the Kales proposal for the selection of some of its judges. Therefore, current merit or commission plans in effect are often referred to as being patterned after the Missouri Plan. Further, there now exists in Missouri a significant debate about whether all judges should be selected under the Missouri Plan. ADEA extension to state judges would intrude upon that debate.

> The underlying concerns manifested by adoption of this exception emphatically do not include a congressional interest in taking sides in the currently active controversies within many states about whether judges shall be elected or appointed. Yet, plaintiff's proposed reading of the statute would introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have judges appointed. Is it a reasonable interpretation of this definition of "employee" that the Act was designed to accomplish this rather significant intrusion into state political choices?

EEOC v. Massachusetts, 680 F. Supp. 455, 461 (D. Mass. 1988). It is irrational to suggest that those states which elect their judges in partisan elections may choose to provide for their mandatory retirement, but that states that select their judges pursuant to a merit system, which includes an element of appointment, may not. Surely, the number of states which hold partisan elections for judges would increase if such were the case, and Missouri could be expected to seriously consider extending the election of judges to cover the appellate bench and trial judges in St. Louis and Kansas City.

Lastly, a finding that judges selected pursuant to the Missouri Plan were exempt from the ADEA would avoid a serious constitutional debate. As discussed in Point II of this brief, if the ADEA prohibits the mandatory retirement of state-court judges, the Tenth Amendment is implicated. Especially in light of the lack of a clear statement by Congress that it intended to preempt mandatory retirement provisions for state-court judges, it should not be necessary to consider whether the political processes referred to in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), have been sufficient to protect Missouri in this case; whether the extension of the ADEA to the states is an exercise of congressional authority under the Fourteenth Amendment or the Commerce Clause; whether *EEOC v. Wyoming*, 460 U.S. 225 (1983), should be distinguished or overruled; and whether *Garcia* should be modified or overruled.

II.

JUDGES SELECTED PURSUANT TO THE MISSOURI NONPARTISAN COURT PLAN ARE ALSO EXEMPTED FROM COVERAGE UNDER THE ADEA AS "PERSON[S] ELECTED TO PUBLIC OFFICE."

Not only does 29 U.S.C. 630(f) define "employee" to exclude "appointee[s] on the policy making level," it also exempts "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof . . . ." The district court determined that the "elected to public office" exemption did not apply to judges appointed and retained under the Missouri Plan. Petition, p. A-20, fn. 3. The Eighth Circuit was inclined to disagree with that conclusion but did not reach it. *Gregory v. Ashcroft, supra*, Petition, p. A-5. The petitioners have acknowledged that this issue is before the Court by addressing it in their brief. Petitioners' Brief, pp. 13-14.[19]

In Missouri, the judges of the state Supreme Court, the state court of appeals, and the circuit and associate circuit judges in the St. Louis and Kansas City metropolitan areas are initially appointed by the Governor. Art. V, § 25(a), Constitution of Missouri. The Governor fills judgeship vacancies from slates of nominees submitted by a nonpartisan judicial commission. The initial appointment is for a specified term. A judge so selected, who wishes to retain his office as a judge, must file in the office of the state Secretary of State "a declaration of candidacy for election to succeed himself." If the declaration is filed, the name of that judge is submitted at the next general election for eligible voters to determine whether to retain him. Art. V., § 25(c)(1). That process must be repeated at the expiration of each term.

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[19] Petitioners explicitly affirm that the "elected to public office" issue is before this Court in their "Reply to Respondent's Brief in Opposition." Moreover this Court has repeatedly held that a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. *Dandridge v. Williams*, 397 U.S. 471, 475, fn. 6 (1970); *Vance v. Bradley*, 440 U.S. 93, 116 (1979) (Marshall, J., dissenting).

The EEOC has taken the official position that persons selected as judges pursuant to nonpartisan judicial selection processes, like that used in Missouri, are "elected to public office."

> [A] state or local judge who is elected by the general electorate or who is appointed by the Governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term "employee" under the ADEA as a "person elected to public office."

EEOC Opinion Letter to Rep. Claude Pepper, April 17, 1987, *reprinted in* EEOC Compliance Man. (BNA) at N:1001, n. 2.

In *EEOC v. State of New York*, 907 F.2d 316 (2d Cir. 1990), the Second Circuit was confronted with the case of a retired New York appellate court judge. The judge had retired at age 70 pursuant to the New York Constitution. New York state law allows its retired appellate judges to continue serving as judges until age 76, if properly certified by the appropriate administrative agency. *Id.* at 318-319.[20] The Second Circuit held that the ADEA was not violated by preventing certification after age 76. Such judges are "elected" because that was the original method of their selection, notwithstanding that later certifications were accomplished by administrative decision. *Id.* at 321. Most importantly, the Second Circuit opined that the question of whether New York certified judges are elected or appointed is a matter to be determined by state law.

> Such is the case here, where the term "elected to public office" is not defined in the ADEA and the question whether it should be interpreted to include certificated justices of the New York Supreme Court is a matter primarily of state concern.

Id.

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[20] Missouri has a similar provision in the mandatory retirement section of its Constitution. Art. V., § 26(3), Constitution of Missouri.

> Any retired judge, associate circuit judge, or commissioner, with his consent, may be assigned by the Supreme Court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge, he shall have the same powers as an active judge.

The only Missouri law on the issue of whether Missouri Plan judges are appointed or elected is represented by a 1973 Missouri Attorney General's Opinion.[21] That Opinion held that while a Missouri Plan vacancy is initially filled by nomination and appointment, that initial selection is only for a limited period of time after which the judge must file his declaration for candidacy pursuant to provisions for elective offices, and that Missouri Plan judges are, therefore, selected to elective office.

Because the issue of whether Missouri Plan judges are appointed or elected is primarily of interest to Missouri, state law holding that they are elected should be binding, there being no federal definition of the "elected to public office" exemption.

III.

EXTENSION OF THE ADEA TO PREEMPT A STATE CONSTITUTIONAL PROVISION RESPECTING THE QUALIFICATIONS OF MEMBERS OF THE STATE JUDICIARY WOULD VIOLATE THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Political Processes in Place to Protect the States Have Been Ineffective Because It Can Not Be Shown that Congress Intended or Even Considered the Extension of the ADEA to State-Court Judges.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), expressly overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976). There is no doubt that under *National League of Cities* an express or implied attempt to preempt a state constitutional provision providing for the retirement of state-court judges at 70 would have

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[21] Op. Mo. Atty. Gen. No. 88 (1973). The opinion concerned a state legislator who wanted to accept the position of circuit judge in a Missouri Plan jurisdiction. The Missouri Constitution, Art. III, § 12, prohibits a legislator from accepting an appointive office, the salary for which has been increased during his term as a legislator.

been invalidated. The respondent submits that, should this Court find that Missouri state-court judges are employees under the ADEA, the preemption of the State Constitution can be invalidated under *Garcia*. The majority opinion in *Garcia*, in a five-to-four vote, abdicated from the federal courts to Congress the function of protecting the sovereignty of the states.

> But the principle and basic limit on the federal commerce power is that inherent in all congressional action — the built-in restraints that our system provides through state participation in federal governmental actions. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556. The *Garcia* majority recognized that the federal Constitution does contain unidentified and undefined limits on the power of the federal government, citing *Coyle v. Oklahoma*, 221 U.S. 559 (1911). In *Coyle*, Congress attempted invalidly to dictate the location of a state capital. It is just as invalid for Congress to dictate the selection, tenure, qualifications, and retirement ages of state-court judges. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

In *Garcia*, the majority opinion relied upon the states' participation in the national political process. In that case, there was no doubt whatsoever that the federal government specifically intended that the Fair Labor Standards Act was to be imposed on governmentally owned mass transit authorities. However, as discussed at some length in Point I of this Brief, there is no indication in the language of the ADEA definitions of "employer" and "employee" or in available legislative history to suggest that Congress intended, or even considered, whether the ADEA would prohibit the mandatory retirement of state-court judges. If this Court should determine that that is the effect of the 1974 and 1986 amendments to the ADEA, it should be apparent that the political processes supposedly in place to protect state sovereignty have not worked. There is no indication whatsoever that any Congressman intended or understood state-court judges to be implicated in the extension of ADEA coverage to the states and the removal of the age 70 upper limit on its coverage.

> Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulations of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or to find the defects that might lead to such invalidation.

South Carolina v. Baker, 485 U.S. 505, 108 S.Ct. 1355, 1360-1361 (1988). The national political processes worked in a defective manner if, as petitioners assert, the import of § 630(f), the 1974 extension of the ADEA to the states as employers, and the 1986 removal of the age cap is to effectively preempt a state constitutional provision providing for the retirement of its judges. It should be incumbent upon the federal judiciary to determine whether the national political process works to protect the sovereignty of the states. If that minimal function is not performed, the Tenth Amendment no longer exists and the states have no protection whatsoever from federal encroachment into their traditional authority.

B. If the Decisions of this Court in *Garcia* and *EEOC v. Wyoming* Cannot Be Distinguished From This Case, They Should be Reconsidered and, If Necessary, Modified or Overruled.

Congress should not be "the sole judge of the limit of . . . [its] own power." *Garcia, supra*, 469 U.S. at 567 (Powell, J., dissenting). The *Garcia* majority approach to federalism provides small comfort to proponents of state sovereignty. It provides, in effect, that because Missourians may vote in presidential elections and because two senators and nine representatives are Missourians, the continued independent existence of the State depends upon the forbearance of an imperial Congress and an overreaching federal bureaucracy. If the ADEA does not exempt state-court judges, the *Garcia* majority approach might preclude judicial review. The majority opinion in *Garcia* mentioned the Tenth Amendment exactly once, and that reference appears in a statement of the question presented. *Garcia, supra*, at 536.

Garcia reduces the Tenth Amendment to "meaningless rhetoric when Congress acts pursuant to the Commerce Clause." *Id.* at 560

(Powell, J., dissenting). The only protection for the state lies in the political decisions made by members of the federal government, decisions which will not be subject to judicial review. *Id.* at 560. Based upon *Garcia*, the role of the states in the federal system "may depend upon the grace of elected officials" (*Id.* at 560-561), as the balancing test of *National League of Cities* is rejected (*Id.* at 562). This approach is contrary to the text of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." *National League of Cities* had been faithful to the Tenth Amendment. The Court observed in that case that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as states by means of the Commerce power." *National League of Cities v. Usery, supra*, 426 U.S. at 842. "Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy." *Garcia, supra*, 469 U.S. at 575 (Powell, J., dissenting).

As is noted in the dissent of Justice O'Connor, *Garcia* poses "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the framers based their faith in the efficiency and vitality of our republic." *Id.* at 484. If the effect of the ADEA is to preempt state constitutional provisions providing for the qualifications of state judges, it is perhaps time to heed Justice O'Connor's admonition:

> I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share Justice REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.

Id. at 589.

Any reasonable assessment of traditional state functions would include the ability to create and maintain a court system. The Court should reinstitute judicial review of federal intrusions upon state sovereignty. It is now time to again embrace the balancing test of *National League of Cities v. Usery*.

If the effect of the ADEA, as amended, is to preempt state mandatory retirement for judges, it may also be necessary to revisit *EEOC v. Wyoming*, 460 U.S. 226 (1983). That case was decided after *National League of Cities* and before *Garcia*. Using the approach of the former with respect to issues of federalism, it held that application of the ADEA to a 55-year-old state game warden was not so great a federal intrusion on the "traditional" or "integral" functions of the state to override congressional action. *Id.* at 239.

EEOC v. Wyoming can be distinguished from this case. Application of the ADEA to a state park ranger is a significantly different proposition from application of the ADEA to a state's judiciary. However, it is difficult to assess the impact of *EEOC v. Wyoming* after *Garcia*. *Garcia* may have mandated the refusal to review Wyoming's situation altogether. Like *Garcia*, the majority opinion in *EEOC v. Wyoming* was a five-to-four decision. If the balancing test of *National League of Cities* were reinstated, it is difficult to reconcile the *EEOC v. Wyoming* result with that test. In both cases, Congress was intruding upon the ability of the states to provide the terms and conditions of employment of their own officials. To the extent that *EEOC v. Wyoming* is inconsistent with any action taken by the Court in this case, it should be modified or overruled.

IV.

MISSOURI'S CONSTITUTIONAL PROVISION PROVIDING FOR THE RETIREMENT OF JUDGES AT AGE 70 IS A RATIONAL MEANS BY WHICH TO FURTHER LEGITIMATE STATE INTERESTS AND IS NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The Eighth Circuit noted that it was "unable to find even a single case wherein a state mandatory retirement provision has been invalidated under the Fourteenth Amendment." *Gregory v. Ashcroft, supra*, Petition at p. A-13. The petitioners have not cured that defect in their Fourteenth Amendment argument by citing any cases on point in their brief.

Old age is not a suspect class and there is no fundamental right to government employment. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*). In *Murgia*, this Court specifically found that a mandatory retirement age statute for state police officers did not call for a strict scrutiny analysis. *Id.* at 314. Old age is not defined as a distinct, insular group for due process and equal protection analyses. A heightened level of analysis should not be applied to state laws or policies relating to age because they do not impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The State of Missouri needs only to show a rational basis for retiring judges at the age of 70. The rational basis test applies to both equal protection and due process challenges. *Malmed v. Thornburgh*, 621 F.2d 565, 575-576 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980).

The Supreme Court of Missouri identified the existence of several rational bases for the retirement of judges. In *O'Neil v. Baine*, 568 S.W.2d 761, 766-767 (Mo. banc 1978), the highest court in Missouri addressed this issue as follows:

> Our citizens are entitled to a judicial system of the highest caliber and to judges with the highest possible mental and physical qualifications. Mandatory judicial retirement is an attempt by the General Assembly to insure the fitness of the judiciary as a whole and to insure the continued competency of the system. The General Assembly in adopting the statute dealt in probabilities. That is all humans can do. There are certain ages in life, learned from experience, at which there is a lessening in mental, physical abilities. If mandatory retirement is invalid at age 70, then at what age — 80, 90, or 100? To paraphrase Holmes, — in life, one must make choices. That is what the General Assembly did . The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system. *Cf. Aronstam v. Cashman*, 325 A.2d 364. The statute is an attempt to insure that, on the whole, only those

> judges who have the vigor, health and vitality will carry out the public's work in administering justice. The function of mandatory retirement is to permit the withdrawal from the bench that group of judges in which disabilities related to aging are most likely to occur. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 Wash.U.L.Q. 378, 397.
>
> Second, the statute which is presumptively valid draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not. A mandatory provision avoids these traumatic and often lengthy hearings.
>
> Third, mandatory retirement increases the opportunity for qualified persons — men and women alike — to share in the judiciary and permits an orderly attrition through retirement. *See Townsend v. City of Los Angeles*, 122 Cal.Rptr. at 503.
>
> Such a provision not only achieves the maximum in qualified judicial personnel, but equally important widens the opportunities for qualified younger members of the Bar to seek a judicial post. Rephrasing *Palmer v. Ticcione*, a state might prescribe a mandatory retirement for judges in order to "open up" judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system.
>
> Fourth, such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans. The General Assembly, having the constitutional power to do so, has established a comprehensive retirement plan for judges based on retirement at age 70. As a corollary, the General Assembly must be able to plan and determine the amount of appropriations necessary to fulfill the statutory benefits provided for the retirement of judges. That is solely the function of the General Assembly.
>
> We remember the difficulties that arose from the absence of a mandatory retirement age for judges. We also recall that there were no provisions for survivors benefits. Judges were, of

necessity, forced to serve beyond the years of their physical and mental abilities. The judiciary, as well as others, pointed out these deficiencies to the General Assembly and they were corrected.

Furthermore, we know that age seventy is an age — a time of life — which is recognized by society as being "about" the time when the physical and mental processes weaken among many men and women. That recognition is embodied in statutes, in private retirement systems and in the policy of the Congress. All of this, and more, is embodied in the policy of § 476.458.

In sum, we conclude that compulsory retirement of magistrate and probate judges at age seventy embodied in the statute is rationally related to the fulfillment of several legitimate state objectives and hence the statute does not violate equal protection.

The court below relied upon this state court authoritative statement of rational bases. *Gregory v. Ashcroft, supra,* Petition at p. A-15.

The First Circuit also found rational bases for the mandatory retirement of judges.

> Massachusetts does not wish to take up the perilous task of evaluating the performance of its older judges, and impeaching or addressing (another method of removing from office) those the legislature feels are no longer qualified. The task is as undesirable as it is difficult, not only because it entails close legislative scrutiny of judicial performance, with a consequent loss to judicial independence, but also because the only constitutionally available methods of removing judges are extraordinary ones, not suited to the kind of pedestrian "discharge for cause" which the Commission argues is still open to the Commonwealth under the ADEA. In the second place, the other concerns expressed by the SJC [Massachusetts Supreme Judicial Court] go well beyond their capacity to perform. The forced turnover may permit the appointment of judges that more closely reflect prevalent points of view, as well as the present societal makeup (and may even permit the state to redress past inequities).

> While these concerns may not be sufficient to make a certain age a bona fide occupational qualification for judges, they are still important state interests that are met by the constitutional age limit.

EEOC v. Massachusetts, supra, 858 F.2d at 57-58.[22]

Other cases have identified rational bases for the retirement of judges. The mandatory retirement provision "eliminates the unpleasantness of selectively removing aged . . . judges." *Malmed v. Thornburgh, supra,* 621 F.2d at 572. It is rational to treat "judges differently from other officials on the ground that the work of judges makes unique and exacting demands on faculties that age tends to erode," and "[m]andatory retirement . . . reduces delays in the administration of justice caused by death or disabling illness of sitting judges," a risk which increases with age. *Trafelet v. Thompson,* 594 F.2d 623, 627-629 (7th Cir.), *cert. denied,* 444 U.S. 906. "A line drawn at age 70 eliminates the anguish, time, delay, expense and embarrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process," and it makes it possible to increase the proportion of minority group members and women in the judiciary, thereby making the judiciary more representative of society. *Apkin v. Treasurer and Receiver-General,* 401 Mass. 427, 517 N.E.2d 141, 146 (1988). The New York Court of Appeals accepted the following bases as rational:

> The mandatory retirement age limitation for State Judges is rationally related to the promotion of any or all of the following State interests: (1) advancement of general considerations of

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[22] The Missouri Plan in association with mandatory retirement allows governors to address past inequities. This has been evident from Governor Ashcroft's recent appointments. Of the six appellate panels incluidng women or minority candidates presented to Governor Ashcroft, a woman or minority has been selected six times. With respect to appellate *and* circuit court panels, twenty slates of nominess have been presented to the Governor which included women or minority members, and fourteen women or minority judges have been appointed by the Governor from those panels.

judicial efficiency (*Rubino v. Ghezzi*, 2d Cir., 512 F.2d 431, 433, *cert. denied*, 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122); (2) motivation and encouragement of qualified younger attorneys with judicial aspirations, by this orderly process of attrition (*Rubino v. Ghezzi, supra; Vance v. Bradley*, 440 U.S. 93, 100, 99 S.Ct. 939, 944, 59 L.Ed.2d 171, *supra*); (3) elimination of the unpleasantness and embarrassment of selectively removing aged and disabled Judges (*Malmed v. Thornburgh*, 3d Cir., 621 F.2d 565, 572, *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219); (4) prevention of harm by a few disabled Judges which more than offsets loss of Judges who retain full powers past age 70 (*Malmed v. Thornburgh, supra)*; (5) elimination of the administrative burden of testing each Judge attaining the age of 70 to assess competency; (6) avoidance of the economic burden of testing and removing incapable judges; and (7) the fixing of a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber Judges in the system (*O'Neil v. Baine*, 568 S.W.2d 761 [Mo]). The challenged provisions mandating retirement at the end of the year in which age 70 is reached manifestly have a rational basis.

Maresca v. Cuomo, 64 N.Y.S. 2d 252, 475 N.E.2d 95, 99 (1984), *appeal dismissed*, 474 U.S. 802 (1985).

Fatal to the petitioners' position is this Court's opinion in *Vance v. Bradley*, 440 U.S. 93 (1979). The Court found that a mandatory retirement provision for foreign service officers must be judged by the rational basis standard. *Id.* at 97. Like petitioners in this case (Brief, p. 31), the appellees in *Vance v. Bradley* contended that the Fourteenth Amendment required the employer to present "current empirical proof that health and energy tended to decline somewhat by age 60 and had to offer such proof for the District Court's perusal before the statute could be sustained." *Id.* at 110. Such a contention is incorrect.

> In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker.

Id. at 111.

The petitioners rely primarily on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case, the Court reaffirmed its decision not to extend heightened review to different treatment based on age and cited *Murgia, supra*, with approval. *Id.* at 441. *Cleburne* did not require that an evidentiary hearing be held in the trial court before a rational basis may be found. After *Cleburne*, this Court decided *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849 (1988). The record before the Court in *Pennell* consisted of a judgment on the pleadings. No evidence had been adduced. The Supreme Court found that the ordinance at issue in *Pennell* did not violate the due process and equal protection clauses of the Fourteenth Amendment.

> We also find that the ordinance does not violate the Amendment's Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303. As we stated in *Vance v. Bradley*, 440 U.S. 93 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we could only conclude that the legislature's actions were irrational."

Id. at 14. The ordinance at issue in *Cleburne* was wholly irrational; the mandatory retirement of state-court judges is not.

In finding rational bases for the mandatory retirement of state-court judges to exist, no court has relied upon the presumption that judges over 70 are automatically unfit to judge. Many judges over the age of 70 may and do retain their full capabilities and could render essential judicial services. The State of Missouri is aware of that fact. In providing for the retirement of its judges at age 70, the State Constitution also allows these retired state-court judges to be assigned as

senior judges or special commissioners. Art. V, 26(3), Constitution of Missouri.[23] Contrary to the brief of the American Association of Retired Persons as *amicus curiae*, the State of Missouri has never submitted, as a rational basis for its constitutional retirement provisions for state-court judges, that persons over the age of 70 are naturally unfit to judge.[24] We assume that Congress, itself, made no such assumption when it set a maximum age of 70 for retention of Chief Judges of both the United States Courts Of Appeal and United States District Courts. 28 U.S.C. §§ 45(a)(1)(A) and 2(C) and § 136(a)(1)(A) and (2)(C).

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[23] This constitutional provision that allows retired state-court judges to continue to provide judicial services constitutes another rational basis for mandatory retirement. In approving a constitution, the people of the State of Missouri may have intended to increase the availability of judicial resources generally, by having both judges and retired senior judges and special commissioners available for judicial duty, without relying upon the state legislature to create and fund additional judicial positions. *See Malmed v. Thornburgh*, 621 F.2d 565, 572 (3d Cir. 1980).

[24] This is another example of petitioners having missed the point. Brief of Petitioner, p. 31. It has never been Missouri's contention that most or all judges over age 70 are incompetent. It is certainly not necessary to remand this case for the consideration of this non-issue.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

VS.

JOHN D. ASHCROFT, Governor of the State Missouri,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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No. 90-50

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REPLY BRIEF FOR THE PETITIONERS

In response to the Brief For The Petitioners, respondent Governor Ashcroft and various amici argue that the Age Discrimination in Employment Act ("ADEA") does not apply to state court judges, and that the mandatory retirement of those judges is not unconstitutional. Among the reasons advanced by the Governor to support those positions are that petitioners are exempted from coverage under the ADEA either as "appointee[s] on the policymaking level" or as persons "elected to public office"; that Congress did not make a sufficiently clear statement of its intent to apply the ADEA not only to the states, but to judges particularly; that application of the ADEA to state court judges violates the Tenth Amendment and general principles of federalism; and that Missouri's arbitrary discrimination against all

of its judges age seventy or above is rational and therefore not in violation of the Equal Protection Clause of the Fourteenth Amendment.

Each of these points is without merit. We address those points in order, to the extent that they require further explication beyond that set forth in the Brief For The Petitioners.

I. THE "APPOINTEE ON THE POLICYMAKING LEVEL" EXEMPTION FROM ADEA COVERAGE DOES NOT APPLY TO APPOINTED STATE JUDGES.

Respondent barely addresses the main thrust of petitioners' argument that the "appointee on the policymaking level" exemption applies "only to persons who advise or work closely with the elected official that chose the appointees." Brief For The Petitioners at 17-18. *See* Brief For The Respondent at 14-15. Insofar as respondent addresses the argument, he does so based on a mis-paraphrased version of the statute, *id.* at 15, and thus reaches the incorrect conclusion that petitioners' construction of the statute renders the policymaking exemption redundant.

To avoid petitioners' argument that the exemptions from ADEA coverage in 29 U.S.C. § 630(f) include only elected officials and persons who work closely with such officials, respondent significantly mischaracterizes the last exemption, that for an "immediate adviser." Respondent states that the last exemption relates to an "advisor with respect to the exercise of the constitutional or legal powers of *an* office," Brief For The Respondent at 15 (emphasis added), rather than "*the* office" of the person who appointed the adviser in the first place. *See* 29 U.S.C. § 630(f). Thus, the exemptions relate to a person elected to public office and three kinds of persons who were appointed by that official — the first and third of whom unquestionably work closely with that elected officer: persons on the official's personal staff and immediate advisers with respect to the exercise of constitutional and legal powers of the appointing authority's office.

Thus, contrary to respondent's mis-paraphrased version of the exemptions, the "appointee on the policymaking level" exemption is indeed "sandwiched" between other persons who are also appointed or selected by an elected official and who work closely with or for that elected official. Petitioners reaffirm that their construction of the policymaking level exemption — requiring the same close working relationship with the appointing elected official — best fits both the structure of § 630(f) as well as the legislative history.

Thus interpreted, the "appointee on the policymaking level" exemption does not become "entirely redundant." *See* Brief For The Respondent at 15. It would apply to cabinet style appointees, such as the secretaries of HUD, HHS, or the Department of Labor — persons who would not fall into the personal staff or immediate adviser exemptions.

Moreover, this Court has previously construed a nearly identical series of exemptions in the same manner as advocated by petitioners. *National League of Cities v. Usery*, 426 U.S. 833 (1976) evaluated the constitutionality of Congress' extension of the Fair Labor Standards Act ("FLSA") to the states by amendment in 1974. 426 U.S. at 836. Like the ADEA, the FLSA generally defines any "employee" as any individual employed by an employer. *Compare* 29 U.S.C. § 203(e)(1) *with* 29 U.S.C. § 630(f). Thus, under the FLSA an individual employed by a state is a defined "employee" unless that employee is not subject to the civil service laws of the state, *and*

> (I) holds a public elective office of that state, political subdivision, or agency,
>
> (II) is selected by the holder of such an office to be a member of his personal staff,
>
> (III) is appointed by such an officeholder to serve on a policymaking level, or
>
> (IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

29 U.S.C. § 203(e)(2)(c) (1970 ed., supp. IV). These exemptions are substantively, if not literally, identical to those in the ADEA definition of "employee."

In *National League of Cities*, then Justice Rehnquist described these exemptions as "excluding from the Act's coverage those individuals holding public elective office or *serving such an officeholder* in one of several specific capacities." 426 U.S. at 839 (emphasis added). This is precisely the interpretation urged by petitioners with respect to the nearly identical provision in the ADEA. *See* Brief For The Petitioners at 16-21. Petitioners, as independent judges, do not serve the elected official who appointed them. *See id.* at 24-26. This Court's prior construction of the nearly identical provision in the FLSA confirms that petitioners' interpretation and construction of the ADEA exemption is correct.

Respondent and several amici cite a footnote in an EEOC opinion letter and completely ignore the discussion in the remainder of the letter on the applicability of the ADEA to appointed state court judges. Brief For The Respondent at 32; Brief of the National Governors' Association, Counsel Of State Governments, et al. As Amici Curiae at 4 (hereinafter "Brief Of National Governors' Association"); Brief Of Amicus Curiae The Washington Legal Foundation at 18-19 (hereinafter "Brief Of Washington Legal Foundation"). *See* EEOC Opinion Letter to Rep. Claude Pepper dated April 7, 1987, *reprinted in* EEOC Compliance Manual at N:1001 (BNA) (hereinafter "EEOC Opinion Letter"). Respondent thus fails to apprise the Court of the EEOC conclusion that appointed judges are not "on the policymaking level" within the meaning of the ADEA: "[T]he Commission believes that *state court judges who are appointed to their positions would not come within the meaning of any of the narrow exclusions from coverage contained in the ADEA definition of the term 'employee'.*" EEOC Opinion Letter at N:1001. One of the amici concedes the deference that is due the EEOC. Brief Of The Washington Legal Foundation at 18 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.17 (1942)).

For the reasons set forth in the Brief For The Petitioners and based upon the interpretation of the nearly identical FLSA exemption by this Court in *National League of Cities*, petitioners submit that the "appointee on the policymaking level" exemption has been properly construed by the EEOC:

> This exception for policymaking level appointees, like the ones for certain personal and immediate advisers on the constitutional or legal powers of an office, requires a close personal and immediate relationship between the elected official and the appointee. It covers only the first line of advisers upon whom the elected official directly relies for advice.

EEOC Opinion Letter at N:1001. Therefore, the "appointee on the policymaking level" exemption does not apply to petitioners and other appointed state court judges who are independent of the official who appointed them.

II. APPOINTED "MISSOURI PLAN" JUDGES ARE NOT "ELECTED TO PUBLIC OFFICE" WITHIN THE MEANING OF THE ADEA EXEMPTION.

Respondent contends that petitioners are "elected to public office" because they must stand for a "retention election." Brief For The Respondent at 31-33. Respondent's contention ignores the statute's plain language, Brief For The Petitioners at 13, the limitations and procedures governing judicial retention questions under Missouri law, *infra* at 7, and the conclusion by Judge Hungate of the district court that "Missouri Plan" judges are *appointed* and *not elected* to public office. Petition at A-20 n.3; Brief For The Petitioners at 13-14.

Respondent cites a footnote in the 1987 EEOC Opinion Letter in an attempt to establish that a retention election makes an appointed judge "elected to public office" within the meaning of the ADEA exemption. Brief For The Respondent at 32. Respondent entirely ignores, however, the EEOC's more recent and more specific position that the "elected to public office" exemption does not apply to appointed Missouri Plan judges who are subject to retention, as evidenced by the EEOC's issuance of a Letter of Violation to the state of Missouri. *See*

Letter to Judge William L. Hungate from Richard W. Schuetz, EEOC Enforcement Manager, dated April 7, 1989 (summarizing the EEOC's investigation of Missouri's retirement of state court judges in response to an inquiry from Judge Hungate).[1]

Thus, the EEOC has taken inconsistent positions with respect to the effect of retention elections upon the status of appointed state court judges under the ADEA. The thoroughness, validity and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given the agency interpretation. *Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). *See also United States v. Clark*, 454 U.S. 555, 565 (1982) (agency's construction of statute entitled to special deference when consistent over long period of time). The conclusion in the EEOC Opinion Letter, that appointed judges who are subject to retention elections are exempted from the ADEA as persons "elected to public office," has not been consistently applied by the EEOC. *See* letter to Judge Hungate from Richard W. Schuetz dated April 7, 1989 (noting issuance of letter of violation to the state of Missouri in connection with Missouri Plan judges that are subject to retention elections). Nor is the EEOC's reasoning thorough; its construction of the "elected to public office" exemption was expressed in dictum in a footnote to the EEOC Opinion Letter. Therefore the EEOC's construction of the exemption in that letter is entitled to considerably less deference than might normally be accorded to such determinations. *See INS v. Cardoza Fonseca*, 480 U.S. 421, 446 n.30 (1987). If any EEOC position is to be credited, it should be the more recent, 1989 determination that appointed Missouri judges are entitled to ADEA protection.

In addition to the plain language of the statute as a basis for Judge Hungate's conclusion that petitioners are not "elected to public office," the Missouri statutory scheme also establishes that petitioners are not candidates for "elective office." The applicable Missouri law provides: "except as otherwise provided in this subchapter, all candidates for *elective office* shall be nominated at a primary election in accordance with the provisions of Sections 115.339 through 115.405 of this subchapter." Mo. Rev. Stat. § 115.339 (1986). The only other provision for the nomination of a candidate "for elective office" is the mechanism for nomination of an independent candidate. *See* Mo. Rev. Stat. § 115.321 (1986). As appointed state judges under the Missouri Plan, petitioners fall within neither category and therefore are not candidates for "elective office" under Missouri law.[2]

Perhaps the most significant proof that Missouri Plan judges are not "elected to public office" is found in the Missouri constitutional provision governing political activity by judges. That section provides that "[n]o judge of any court in this state, appointed to or retained in office in the manner prescribed in §§ 25(a)-(g), shall directly or indirectly ... take part in any political campaign." Mo. Const. art. V, § 25(f).

In light of the fact that Missouri Plan appointed and retained judges may not be a candidate for "elective office" under Missouri law and may not take part in any political campaign, in light of the different

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[1] A copy of the EEOC letter to Judge Hungate, which notes the issuance of a Letter of Violation, is reprinted as an appendix to this brief. *See* correspondence filed in the district court record and dated 3/31/89, 4/12/89, 5/5/89 and 5/9/89 in the district court docket sheets.

[2] The distinctions between a "question" and an opposed, partisan election offer further proof that Missouri Plan judges are appointed and not elected. A "question" is "any measure on the ballot which can be voted 'yes' or 'no'." Mo. Rev. Stat. § 115.013(22) (1986). Missouri Plan judges are subject to the *question* of retention. Mo. Const. art. V, § 25(b). While only a "*candidate* for *election* to any office may challenge the correctness of the returns for the office," Mo. Rev. Stat. § 115.553(1); *see State ex rel Bushmeyer v. Cahill*, 575 S.W.2d 229 (Mo. Ct. App. 1987); only voters may challenge the results of any "question." Mo. Rev. Stat. § 115.553(2). *See* Mo. Rev. Stat. § 115.555 (specifying procedure for contests "on *questions* relating to the retention of Missouri Plan judges"). Apparently, a Missouri Plan judge may not even challenge the result of a retention question involving his or her own retention, except perhaps as a voter. *See* Mo. Rev. Stat. §§ 115.553, 115.555. *Cf.* Mo. Const. art. V, § 25(f) (appointed judges are prohibited from taking part in any political campaign).

challenge procedures for "elections" as opposed to "questions," and in light of the issuance of a Letter of Violation to the state of Missouri by the EEOC, Judge Hungate surely was correct in ruling that petitioners were not "elected to public office" within the meaning of the ADEA exemption of 29 U.S.C. § 630(f).

III. WHEN CONGRESS DRAFTED THE EXEMPTIONS FROM THE ADEA DEFINITION OF "EMPLOYEE," IT REASONABLY DISTINGUISHED THE GROUP COMPRISED OF ELECTED OFFICIALS, THEIR SUPPORTING STAFF, APPOINTEES AND ADVISERS FROM OTHER STATE EMPLOYEES.

Respondent argues that Congress could not have intended for appointed judges to be "employees" under the ADEA, because that construction of the statute would lead to the "irrational" result of appointed judges being protected under the ADEA, while elected judges are not. Brief for the Respondent at 13-15. Respondent's argument is not well taken for several reasons.

First, the argument errs in focusing upon elected versus appointed *judges*, when the distinction that Congress made was between elected versus appointed *officials*. "Any perceived imprudence in this dichotomy is a matter to be addressed to Congress." *EEOC v. Vermont*, 904 F.2d 794, 801 (2d Cir. 1990). Second, respondent's argument ignores Senator Ervin's stated intention for distinguishing between elected officials and other state employees: that exempting elected officials was necessary to avoid the possibility that an election could be challenged based upon impermissible motives on the part of the voters. 118 Cong. Rec. 4096 (1972) (statement of Sen. Ervin), *quoted in* Brief of the National Governors' Association at 10 n.9. The additional exemptions allowed an exempted elected official to pick his own team for his family of close advisers. *See* 118 Cong. Rec. at 4097 (1972) (Statement of Sen. Ervin). This distinction is rational and justifies a distinction between exempt elected officials and non-exempt appointed officials, even if they might be similarly situated as to job responsibilities. Third, and most significant, Missouri itself recognizes a distinction between elected and appointed judges and has made

a conscious choice to elect some judges and to appoint others. If Missouri can make the distinction, Congress can surely act on the same distinction in regulating one and not the other.

While it may seem peculiar that Missouri Plan judges would be protected under the ADEA while other elected judges in Missouri would not, the peculiarity is not a result of a misapplication of the statute or a misunderstanding of Congressional intent; it is the direct result of Missouri's unusual, bifurcated judicial selection system and its provision for the appointment of some judges and the election of others. While it may seem anomalous that an elected Missouri judge and an appointed Missouri judge could be treated differently under the ADEA, the anomaly arises not from any irrationality in petitioners' reading of the statute's plain language, but instead arises from the differing methods for selecting judges under Missouri law.

IV. IN "UNMISTAKABLY CLEAR" LANGUAGE CONGRESS EXPRESSED ITS INTENTION TO APPLY THE ADEA TO THE STATES AND TO REGULATE THE STATES' EMPLOYMENT RELATIONSHIP WITH STATE EMPLOYEES, INCLUDING JUDGES.

Both respondent and several amici assert that the extension of ADEA coverage to petitioners and other similarly situated state court judges intrudes on a traditional area of state sovereignty; accordingly, so the argument goes, it should not be presumed without an "unmistakably clear" statement — which respondent and amici contend is lacking — that Congress intended to displace or preempt state laws or constitutional provisions that regulate state judiciaries. Brief For The Respondent at 26-28; Brief For Amici Curiae Colorado, Florida, Hawaii, Massachusetts, et al. at 6-10 (hereinafter "Brief For Massachusetts"); Brief Of Amicus Curiae State of Vermont at 5-8, 10-13 (hereinafter "Brief Of Vermont").

To the extent that Respondent and amici are indicating that Congress did not clearly and unmistakably state its intention that the ADEA was to apply to the states as states, respondent and amici are plainly and simply incorrect. To the extent that respondent and amici are attempt-

ing to extend the "clear statement" rule to require an additional clear statement of all the factual possibilities and ramifications of applying a particular piece of legislation to the states, such an extension is unwarranted both under this Court's precedents and as a matter of policy.

In defining those persons or entities who were to be regulated under the ADEA, Congress stated its intention to regulate the states in plain and unmistakable language: "The term 'employer' means ... a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State ...." 29 U.S.C. § 630(b). The ADEA was made applicable to the states in 1974 by an amendment that inserted this specific, "unmistakably clear" language. The same amendment deleted statutory text that previously had *excluded* the states from coverage under the ADEA. Pub. L. 93-259, § 28(a), 88 Stat. 55, 74 (1974). Congress could not have been clearer in stating its intention to regulate the states as states under the ADEA.

Respondent's clear statement argument has previously been addressed and rejected by this Court's holding that the ADEA itself seeks to regulate the states as states. *See EEOC v. Wyomi*ng, 460 U.S. 226, 237 (1983) ("the first requirement — that the challenged federal statute [the ADEA] regulate the 'States as States' — is plainly met in this case"). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976) (extension of Title VII to the states, based on language identical to that in the ADEA, constituted a clear statement necessary to abrogate the Eleventh Amendment); *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) (Posner, J.) (with respect to ADEA, Congress "could not have made its desire to override the states' sovereign immunity clearer").

Ironically, respondent defeats his own argument, that Congress did not clearly state its intent to regulate the states, when he calls for this Court "to again embrace the balancing test of *National League of Cities v. Usery*." Brief for the Respondent at 36. Like the Fair Labor Standards Act in *National League of Cities*, however, the ADEA "seeks to regulate directly the activities of states as public employers," *see National League of Cities v. Usery*, 426 U.S. at 841, and spoke "directly to the States *qua* States." *See id.* at 847. *Compare* 29 U.S.C. § 203(e)(2) (FLSA applies to individuals employed by a state or political subdivision thereof, except for certain specified, exempted employees) *with* 29 U.S.C. § 630(b) (ADEA applies to individuals employed by a state or political subdivision thereof, except for certain specified, exempted employees who fall into the same general exceptions as in the FLSA). *National League of Cities* would be applicable *only* because the challenged statute in this case, the ADEA, like the FLSA, *sought to regulate the states as states*.

With respect to the second part of respondent's clear statement argument — that Congress needs to make a clear statement not only that it intends to regulate the states as states, but also that it intends to regulate the states as states in connection with their employment of judges — respondent offers no case law or other support for this unwarranted extension of the "clear statement" cases. Such a requirement is inherently unworkable and would force Congress to draft long and detailed lists of which particular state functions and employees it meant to regulate. While *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), may have required "unmistakably clear" language of Congress' intention to abrogate the States' immunity from suit in federal court, this Court has never required that the clear statement of Congressional intent indicate each potential, factual application of the legislation upon the states. All that this Court has heretofore required is a statement in the statute itself that is sufficiently clear to enable a court to answer "yes" or "no" to the question "did Congress clearly express its intention to regulate the states?"

Respondent offers no reasonable basis for extending the clear statement rule to require a clear statement of all possible applications of the regulation of the states by Congress. Moreover, if respondent is advocating that a clearer statement of specific applications of federal legislation is only needed in particularly "intrusive" regulations of the states, it offers no test for determining which applications of a particular statute to the states will require a clear statement.

In reality, respondent's advocacy of a detailed, "especially clear statement" requirement appears to be little more than an attempt to

resuscitate *National League of Cities*' restraints on federal regulation of the states by another means. Such questions about the power of Congress to regulate the states should be addressed directly, however, and not indirectly through an unwieldy extension of the clear statement rule in a way that is as unworkable as it is illogical. Requiring a clear statement of an intent to regulate the states is one thing; avoiding questions about the *power* of Congress to regulate the states, by judicially imposing a standardless and vague requirement of an "especially" clear statement of particular applications under a statute that clearly regulates the states, is quite another thing. The former is already required under the "clear statement" cases, and Congress has made the requisite statement in the ADEA. The latter is not required by the Tenth or Eleventh Amendments, the Guarantee Clause or any other constitutional notions of "federalism."

V. NEITHER THE TENTH AMENDMENT NOR GENERAL PRINCIPLES OF FEDERALISM PROSCRIBE APPLICATION OF THE ADEA TO STATE JUDGES.

Respondent and several amici argue that a state has a right, apparently unqualified, to prescribe the qualifications of its officers. Brief for the Respondent at 28; Brief of Vermont at 6, 10, 15; Brief for Massachusetts at 30. According to respondent, Congressional invalidation of state constitutional provisions mandating the retirement of state judges under the ADEA allegedly intrudes improperly "upon the ability of the state to provide the terms and conditions of employment of their own officials." Brief For The Respondent at 37. Therefore, respondent argues for the first time, in this Court or any other court, that the Tenth Amendment and notions of federalism operate to limit the constitutional reach of the ADEA, at least as applied to appointed state judges. *Id.* at 33-37.

Preliminarily, by *never* raising this issue in *any* court, respondent has waived his right to make a Tenth Amendment or other claim based upon principles of federalism. This claim has been waived, is not properly before this Court and should be rejected out of hand. *See General Utilities & Operating Co. v. Helvering*, 296 U.S. 200, 206 (1935). Unlike the "elected to public office" defense which respondent raised in the district court but which was not relied upon in the court of appeals, respondent *never* raised a Tenth Amendment or federalism argument at any stage of this litigation.[3]

Substantively, respondent's Tenth Amendment defense is without merit under both existing law, *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), as well as *National League of Cities v. Usery*, 426 U.S. 833 (1976), the case that was overruled by *Garcia*. Initially, respondent analyzes his federalism claim under *Garcia* and argues that the "national political processes worked in a defective manner" and therefore rendered Congress' regulation of state activities under the ADEA invalid under the Tenth Amendment. Brief For The Respondent at 35 (citing *South Carolina v. Baker*, 45 U.S. 505 (1988)). This conclusory allegation is insufficient to show that the national political process was defective when Congress amended the ADEA and extended its application to the states in 1974, or when Congress raised and eventually eliminated the upper age limits on the protected class in 1978 and 1986.

Respondent contends that the political processes failed because Congress did not understand that state judges might be implicated by extension of ADEA coverage to the states and removal of the ADEA's upper age limit. Brief For The Respondent at 34. It is presumed, however, that legislators know the existing law when they pass legislation, *Miles v. Apex Marine Corp.*, ____ U.S. ____ 111 S. Ct. 317, 325 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), and it therefore is beyond question that the representatives and senators in Congress knew the method of selecting the state judges in their home states at the time that each of the ADEA amendments were enacted. *See id.* When Congress applied the ADEA to the states by amending it in 1974, thirty-six states appointed judges on at least one level of their judiciary. *See* Note, *Mandatory Retirement Of Appointed*

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[3] Most significantly, respondent failed to raise the issue in this Court in opposition to the petition for certiorari. Only *after* petitioners filed their brief in chief did respondent raise this new constitutional issue. Respondent's dilatory conduct has had a prejudicial effect upon petitioners' ability to brief this issue in sufficient detail at this stage of the proceedings.

State Judges: Balancing State and Federal Interests, 25 Val. U.L. Rev. 125, 146 n.148 (1990) (hereinafter "*Mandatory Retirement of Appointed State Judges*") (citing *Council Of State Governments, The Book Of The States*, Table 5 (1972-73)). Therefore, given (1) Congress' knowledge of the varying methods for selecting state judges and (2) the lack of any procedural defect in the legislative process that amended the ADEA, application of the ADEA to regulate the states and their employment relationship with certain state employees, in this case judges, is constitutional under *Garcia*.

Respondent also avers that "[t]here is no doubt that under *National League of Cities* an express or implied attempt to preempt a state constitutional provision providing for the retirement of state-court judges at seventy would have been invalidated." Brief For The Respondent at 33-34. To the contrary, there is *considérable doubt* about whether regulation of state court judges under the ADEA would be invalidated if this Court overruled *Garcia* and returned to the *National League of Cities* test.

This Court applied the *National League of Cities* test when it *upheld* the constitutionality of applying the ADEA to the states in *EEOC v Wyoming*, 460 U.S. 226 (1983). For respondent to claim that the ADEA's application to state judges is unconstitutional under *National League of Cities*, he would have to show that the ADEA is unconstitutional *as applied* in this case. To do so, respondent would have to establish (1) that the ADEA "regulates the 'States as States,'" (2) that the ADEA addressed "matters that are indisputably 'attribute[s] of state sovereignty,'" and (3) that Missouri's non-enforcement of its Mandatory Retirement Provision against state judges would "directly impair" its ability "'to structure integral operations in areas of traditional governmental functions.'" *See EEOC v. Wyoming*, 460 U.S. at 237 (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981)).

Although the ADEA clearly regulates the states as states and thereby satisfies the first prong of the *National League of Cities* test, it is not at all clear that either of the other two prongs would be satisfied in this case. In *EEOC v. Wyoming* this Court did not address the second

prong because it found that the third prong was not satisfied. Although the Court acknowledged that management of state parks was a "traditional state function," it also found that requiring the retirement of state game wardens, based on inability to perform rather than an arbitrary age limit, would not directly impair the state's ability to "structure integral operations." Such impairment would only be found if the federal intrusion threatened Wyoming's "separate and independent existence." 460 U.S. at 239.

Similarly, the ADEA's requirement that Missouri not discriminate arbitrarily against its appointed judges on the basis of age poses no threat to Missouri's separate and independent existence. Allowing Missouri's judges to continue to work as long as they are capable would not cost the state any more money. Any reasons that Missouri may have as a basis for its mandatory retirement provision could be met by less restrictive alternatives, such as limiting the terms of its judges or using its existing constitutional provision for the retirement, removal and discipline of judges. *See* Mo. Const. art. V, § 24. Application of the ADEA to Missouri's judges does not threaten Missouri's separate and independent existence.

The second prong of the *National League of Cities* test would also not be met. Although prescribing the qualifications of its own judiciary might seem to be an "indisputable attribute of state sovereignty" at first blush, Missouri has neither an indisputable sovereign right to invidiously and arbitrarily discriminate based on age, nor is its existence threatened by a regulation that merely allows its appointed judges to continue working so long as they are capable.

Respondent's Tenth Amendment argument is deficient in another major respect, even assuming that *Garcia* were overruled as respondent advocates. The ADEA was passed under two sources of constitutional authority, the Commerce Clause, U.S. Const. art. 1, § 8, Cl. 3, and the enforcement clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 5. *Davidson v. Bd. of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698-700 (1st Cir. 1983). *See EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (leaving open the question whether the ADEA was enacted

pursuant to enforcement authority of § 5 of the Fourteenth Amendment).

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Congressional under § 5 power to legislate and thereby to enforce the Equal Protection Clause in § 1 of the Fourteenth Amendment is not limited by the Tenth Amendment. *EEOC v. Wyoming*, 460 U.S. at 243 n.18; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 287 n.28 (1981). The legislative history of the ADEA, though not extensive, supports the conclusion that Congress understood in 1974 that extension of the ADEA to state and local government employers was supported by both the Commerce Clause and section 5 of the Fourteenth Amendment. *See generally Ramirez*, 715 F.2d at 698-700; *Arritt v. Grisell*, 567 F.2d 1267, 1270-71 & n.11 (4th Cir. 1977); *EEOC v. County of Calumet*, 519 F. Supp. 195, 198-200 (E.D. Wis. 1981).

Congress first considered extending the ADEA to cover state and local government employers in 1972, when it amended Title VII of the Civil Rights Act of 1964 to cover state and local government employers in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(f), 86 Stat. 103, 42 U.S.C. § 2000(e)(f)). *See* 118 Cong. Rec. 7745-46 (1972) (remarks of Sen. Bentsen); S. Rep. No. 92-842, 92d Cong., 2d Sess. 45-46 (1972).

> There is no dispute that in enacting the 1972 amendment to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. *See, e.g.*, H.R. Rep. No. 92-238, p. 19 (1971); S. Rep. No. 92-415, pp. 10-11 (1971).

Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976). Respondent virtually concedes that the employee exemptions of Title VII, which are identical to the ADEA, could be constitutionally applied against Missouri to prevent discrimination against its appointed judges. Brief For The Respondent at 22-23. Given the similarity between Title VII and the ADEA, as well as the many references in Congress that indicates a perception of arbitrary discrimination based on age as being

"invidious" and comparable to discrimination based on race, sex, religion, or national origin, [4] it is apparent that Congress believed that the 1974 amendments to the ADEA were quite plainly supported by § 5 of the Fourteenth Amendment. *See* S. Rep. No. 93-690, 93rd Cong., 2d Sess. 55 (1974); H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 40 (1974). Both of these committee reports quote with approval the following passage from the President's statement recommending the legislation:

> Discrimination based on age — what some people call 'age-ism' — can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working.

Id.

In light of statements like these in the ADEA legislative history, Congress' enactment of the ADEA was appropriate legislation under § 5 of the Fourteenth Amendment to enforce upon the states the protections of the Equal Protection Clause in § 1 of the Fourteenth Amendment. *See City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 324-27 (1966). The ADEA merely constitutes "appropriate legislation" to enforce the Equal Protection Clause and eliminate arbitrary, invidious age discrimination.[5] It does not prohibit all discrimination

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[4] *See generally Mandatory Retirement of Appointed State Judges*, 25 Val. U.L. Rev. at 132 n.47 and accompanying text.

[5] The fact that age-based classifications are not subject to strict scrutiny under the Equal Protection Clause does not mean that they are not a proper subject for Congress' enforcement authority under § 5 of the Fourteenth Amendment. A totally irrational state practice based on age (*e.g.*, prescribing the death penalty for anyone over the age of 50 convicted of a felony of any kind) would surely be struck down under the Fourteenth Amendment; age-based practices are therefore a proper subject of both Equal Protection Clause scrutiny and Congress' enforcement powers.

based on age, just that which is unreasonably arbitrary and which cannot be justified as a "bona fide occupational qualification." *See* 29 U.S.C. § 623(f)(1). Respondent's argument that the ADEA's application to state judges is precluded by the Tenth Amendment and principles of federalism must therefore fail, because the ADEA is appropriate legislation under Congress' enforcement powers under § 5 of the Fourteenth Amendment.

VI. MISSOURI'S ARBITRARY AGE DISCRIMINATION AGAINST ITS JUDGES IS IRRATIONAL AND SHOULD BE INVALIDATED UNDER THE FOURTEENTH AMENDMENT.

Respondent does not discuss in any detail the case that is the linchpin of petitioners' equal protection claim, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Instead, respondent recites that old age is not defined "as a distinct, insular group for due process and equal protection analyses," and that policies relating to age "do not impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class." Brief For The Respondent at 38. Respondent's equal protection analysis fails to recognize, however, that while classifications based on age may not be entitled to strict scrutiny, they nevertheless operate to classify a discrete and insular group with immutable characteristics, and such legislation is not automatically rational. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities ... may call for a correspondingly more searching judicial inquiry"). *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445-46 (1985) (recognizing the aged, the disabled, the mentally ill and mentally retarded as discrete groups with immutable disabilities and "who can claim some degree of prejudice from at least part of the public at large").

Respondent argues that *Vance v. Bradley*, 440 U.S. 93 (1979), is "fatal" to petitioners' position. Brief For The Respondent at 42-43. First, *Vance v. Bradley* is distinguishable because the foreign service officers who challenged a mandatory retirement provision in that case

were required to endure demanding physical challenges and conditions, unlike judges. 440 U.S. at 98. *See* Brief For The Petitioners at 29 n.16. Second, more than a decade has passed since the decision in *Vance v. Bradley*, and "the legislative facts on which the classification [in that case was] apparently based" can no longer "reasonably be conceived to be true." 440 U.S. at 111. Over time, laws based on antiquated notions and prejudices become irrational, although they once might "reasonably [have been] conceived to be true." Thus, the ordinance classifying the mentally retarded fell in *Cleburne*. 473 U.S. at 445-48. Missouri's mandatory retirement provision, which is similarly based on antiquated notions and unfounded prejudices against the aged, must also fall in this case.

Classifying people arbitrarily based upon their age classifies them immutably; just as there is no changing one's race or sex, one cannot "turn back the clock." Since the decision in *Vance*, Congress has entirely eliminated the age seventy cap on the protected class in the ADEA, in recognition of the increasingly overwhelming evidence that advancing age does not correlate with declining ability. *See* Brief Amicus Curiae Of American Association Of Retired Persons at nn.20-26, 29-38 and accompanying text. Statutes that *arbitrarily* discriminate based on age can no longer be presumed rational and should be invalidated.

Respondent alleges that he has never contended "that persons over the age of 70 are naturally unfit to judge." Brief For The Respondent at 44. Yet in the same brief, as rational bases for the mandatory retirement of Missouri's judges, respondent cites an attempt to retain "only those judges" who have "vigor, health and vitality," *id.* at 38-39 (quoting *O'Neil v. Baine*, 568 S.W.2d 761, 766 (Mo. 1978) (en banc)), and the "know[ledge] that age seventy is an age ... which is recognized by society as being 'about' the time when the physical and mental processes weaken among many men and women." *Id.* at 40 (again quoting *O'Neil v. Baine*). *See also* Brief For The Petitioners at 27 n.14 (quoting Respondent's Interrogatory Answer, which refused to identify any persons with knowledge of the state's rational basis for its mandatory retirement provision because such knowledge "is a matter

of *good common sense and an understanding of the vicissitudes of life and the aging process*").

Respondent does not attempt to distinguish *Cleburne* other than to state in conclusory fashion that the challenged statute therein "was wholly irrational," while the mandatory retirement provision challenged here "is not." Brief For The Respondent at 43. As stated in the Brief For The Petitioners at 27-31, the rational bases advanced by respondent, other than that asserting a decline in some judges' physical and mental ability after age seventy, are irrational under *Cleburne*. Respondent's remaining "rational" basis for the mandatory retirement of judges at age seventy, the elimination of judges who may be declining in physical and mental ability, actually operates to select so few judges of declining ability as to be irrational. As a winnowing tool, Missouri's mandatory retirement provision throws out a bushel of wheat with every cup of chaff.

VII. CONCLUSION

For the foregoing reasons petitioners respectfully request that this Court reverse the Eight Circuit judgment on the ADEA claim, vacate the judgment on the equal protection claim, and remand for the reasons set forth in the Brief For The Petitioners.

DATED this 11th day of March, 1991.

Respectfully submitted,

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APPENDIX

BEST AVAILABLE COPY

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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April 7, 1989

Honorable William L. Hungate
United States District Court
Eastern District of Missouri
1114 Market
St. Louis, MO 63101

Re: Civil Action No. 88-0221C(3)
Gregory et al v. Ashcroft

Dear Judge Hungate:

The Equal Employment Opportunity Commission handled a directed investigation of the issues of mandatory retirement of appointed state court judges, as well as the issue of penalizing judges who fail to retire, under the case number 280890210, entitled *Directed v. State of Missouri*. During the processing of that case, our investigator, Maria Schulte, telephoned Michael Boycourt [sic] to ascertain whether the state was interested in settlement discussions. Mr. Boycourt [sic] declined to discuss settlement and stated a number of reasons.

Thereafter, the Commission issued its Letter of Violation and made one further effort to inform the state that settlement was available. Mr. Boycourt [sic] declined settlement again, stating a number of additional or different reasons.

When the charges of the plaintiffs were received by the Commission, the Commission notified the state of the charges, provided copies, and asked that the state submit responses to the charges by January 31, 1989, along with whatever supporting documentation was available. No responses have been received.

In light of the earlier charge and this lawsuit, these charges were administratively closed so that the litigation could continue, since more than sixty days had elapsed from their filing.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

/s/ Richard W. Schuetz
Enforcement Manager

(4)

NO. 90-50

Supreme Court, U.S.
FILED
JAN 9 1991
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

The Honorable Ellis Gregory, Jr., and
The Honorable Anthony P. Nugent, Jr.,
Petitioners,

vs.

The Honorable John D. Ashcroft,
Respondent.

BRIEF OF AMICUS CURIAE
The Honorable John W. Keefe
In Support Of Petitioners

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I. MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Honorable John W. Keefe hereby moves, pursuant to S. Ct. Rules 37 and 21, for permission to file the attached brief. Judge Keefe is personally interested in the resolution of this case and its constitutional implications as he is currently prevented from placement of his name on the ballot for elective judicial office in Ohio solely because of his age. The resolution of this case, and particularly the standard of review used to decide this case, and its implications for denial of ballot access, will impact the constitutionality of mandatory retirement laws for judges in many states, including Ohio.

Counsel for both petitioners and respondent orally consented to the filing of this brief and its discussion of the proper standard of review on January 3, 1991. The written consent of petitioners has been obtained. Appendix A. As yet, respondent's written consent has not been received. We file this motion because of the rapidly approaching filing deadline.

Respectfully submitted,

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Attorneys for Amicus Curiae,
The Honorable John W. Keefe

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-50

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The Honorable John W. Keefe
In Support Of Petitioners

II. NATURE OF INTERESTS OF AMICUS CURIAE

The Honorable John W. Keefe has been a judge serving the courts in Ohio for thirty-seven years.[1] On October 2, 1985, as he approached the expiration of his term as judge of the First District Court of Appeals, his attempt to have his name placed on the ballot for re-election was rejected by the county board of elections based solely on the fact that he was seventy years old and would be unable to qualify for office under section 6(c), Article IV of the Ohio Constitution. That provision

[1] Judge Keefe is presently serving as a senior "assigned" judge by appointment of and at the pleasure of the Chief Justice of the Ohio Supreme Court in the trial and appellate courts of Ohio.

states in relevant part: "No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. * * *" In Ohio all judicial offices are elective, except for the filling of vacancies prior to special elections or for the temporary assignment of senior judges.

Judge Keefe's mandamus action in the Ohio Supreme Court was unsuccessful in its attempt to compel the county board of elections to place his name on the ballot. *State, Ex Rel. Keefe* v. *Eyrich*, 22 Ohio St.3d 164, 489 N.E.2d 259 (1986). Several of Ohio's justices opined that the standard of constitutional review for the challenged law should be strict scrutiny because it affected the fundamental right to vote and the right of access to the ballot. *Id.* at 179-86, 489 N.E.2d at 271-76.

In his separate concurring opinion Justice Brown invited guidance from this Court on the proper standard of review, as follows:

> The United States Supreme Court has handed down a line of decisions which I believe at least arguably imply that the age-seventy provision at bar offends the federal Constitution. These cases involve the right to vote and the right of access to the ballot,
> * * *
> the strict scrutiny standard may be called for, requiring the state to demonstrate that the limitation is necessary to achieve some compelling state interest.
> * * *
> It is evident from the foregoing that the case at bar presents a multitude of difficult constitutional questions as yet unresolved by this nation's highest court. I look forward with interest to the possibility of more specific guidance from that quarter.

Id. at 171-74, 489 N.E.2d at 265-7.

Since 1985 Judge Keefe's access to the ballot has been roadblocked.

In the case *sub judice* Missouri's challenged mandatory retirement provision of the Missouri Constitution affects both appointed judges under the Missouri Non-Partisan Court Plan (Mo. Const. Art. V, § 25(c)(1)) and elected circuit judges (Mo. Rev. Stat. § 478.010). Judge Keefe supports the petitioners' constitutional challenge to Missouri's mandatory retirement provision.

III. RELEVANT QUESTION OF LAW NOT ADEQUATELY PRESENTED

Discussion of the proper standard of review for the petitioner's constitutional challenge is not expected to be adequately presented. The main thrusts of petitioner's challenges are: The application of the Age Discrimination in Employment Act to appointed judges; and violation of the equal protection clause and due process requirements under the fourteenth amendment to the United States Constitution even under a rational basis review. Because the effect of such mandatory retirement laws is to inhibit access to the ballots, and to limit voting rights, the proper standard of review should be strict scrutiny.

Although the named petitioners are both appointed under the Non-Partisan Plan, the challenged law also applies to Missouri judges elected in partisan, general elections, such as Judge Flake L. McHaney, a plaintiff below. Furthermore, even appointed judges must face retention elections. The resolution of the constitutional issues in this case, therefore, will directly bear upon the mandatory retirement laws for judges of other states, such as Ohio, which laws expressly prohibit election to judicial office of elder candidates regardless of their abilities or qualifications.

IV. ARGUMENT

THE STANDARD OF REVIEW FOR LAWS REQUIRING MANDATORY RETIREMENT FOR JUDGES WHICH INHIBIT ACCESS TO BALLOTS AND INHIBIT VOTING RIGHTS SHOULD BE STRICT SCRUTINY.

It is well established that the right to vote is a fundamental right requiring a higher standard of review. *See, e.g., Reynolds* v. *Sims*, 388 U.S. 533 (1964). *William* v. *Rhodes*, 393 U.S. 23 (1968).

In *Bullock* v. *Carter*, 405 U.S. 134 (1972), this Court struck down a Texas law requiring substantial filing fees for candidates. The requirement was found "patently exclusionary", precluding some candidates from the ballot regardless of qualifications and popular support. This Court held that the effect on voters was neither incidental nor remote. *Id.* at 143-44. This Court held that the strict scrutiny standard was appropriate, and that the state must demonstrate the necessity of the limitation to a compelling state interest. *Id.* at 147.

Similarly, a law preventing access to the ballot for a popular seventy year old jurist has a real effect upon the candidate, his supporters and upon the voters, and the strict scrutiny standard should be employed. The candidate, his supporters, and the electorate are all entitled to protection of their rights. As Chief Justice Burger wrote for the Court: "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Id.* at 143. This sentiment was repeated, in *Lubin* v. *Parish*, 415 U.S. 709 (1974), where this Court emphasized that both the candidate's and the voters' interests are entitled to protection and that their interests can not be unfairly or unnecessarily burdened.

In *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974), this Court further noted that access to the ballot, interests in casting an effective vote and interests in running for office are protected by the First Amendment's freedom of

association, requiring a strict scrutiny of laws impinging thereon. *Id.* at 449. In a similar fashion, the challenged laws, which impede access to the ballots and voting rights, impinge upon the freedom of association and also require strict scrutiny.

Where a state intends to restrict access to the ballot, the restriction must be necessary for the achievement of some compelling state interest and the state must use the least drastic means to achieve that state interest. *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184-5 (1979). This Court has stated that:

> By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences . . . voting is of the most fundamental significance under our constitutional structure * * * When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest
> * * *
> and we have required that States adopt the least drastic means to achieve their ends. *Id.* (Citations omitted).

The guidelines for constitutional review of candidate restrictions were set forth in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). This Court instructed the courts of this land 'o consider the injury to the right protected "by the First and Fourteenth Amendments", then to "identify and evaluate the *precise* interests put forward by the State as justifications for the burden imposed by its rule", and then "determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 789 (emphasis added).

Older people in private and public office are demonstrating their abilities admirably throughout the nation well beyond age seventy. Age seventy is not a reliable indicator of feeblemindedness. With the maturing of our national population,

more candidates and voters are being disenfranchised by laws which proscribe election of septuagenarian judges.

For the reasons stated by petitioners Missouri's challenged law is not necessary to promote any articulated compelling state interest, is not drafted in the least drastic means and cannot withstand strict scrutiny. Similarly, mandatory retirement laws for judges in other states where the right to vote and access to the ballot are affected, such as in Ohio, cannot withstand strict constitutional scrutiny.

V. CONCLUSION

Because the challenged laws impede access to the ballots and restrict voters' rights, the proper standard of review is strict scrutiny to determine whether they run afoul of the First and Fourteenth Amendments to the United States Constitution.

As the challenged laws are not necessary to protect any precisely articulated compelling state interest, nor are they narrowly tailored, they should be declared unconstitutional.

Dated this 9th day of January, 1991.

Respectfully Submitted,

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APPENDIX A

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January 3, 1991

Mr. Dan Spraul
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Re: *Gregory* v. *Ashcroft*, No. 90-50

Dear Mr. Spraul:

This is to confirm our conversation today wherein I consented to your request to file an amicus brief in *Gregory* v. *Ashcroft*, No. 90-50. I appreciate your interest in the case and hope that your brief will be well received.

Very truly yours,

GUILFOIL PETZALL & SHOEMAKE

/s/ BRUCE D. LIVINGSTON
Bruce D. Livingston

BDL:jek

Supreme Court, U.S.
FILED
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CLERK

No. 90-50

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ELLIS GREGORY, JR. and
ANTHONY P. NUGENT, JR., JUDGES,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, excludes appointed state judges from its coverage as "appointees on the policymaking level." 29 U.S.C. § 631(f).

(2) Whether a mandatory retirement age for elected and appointed judges violates the Equal Protection Clause of the Fourteenth Amendment.

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The American Association of Retired Persons (AARP) is a nonprofit organization of approximately thirty-three million persons age 50 and older. More than eleven million AARP members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, "ADEA," 29 U.S.C. § 621 *et seq.*

AARP seeks to insure that older persons are judged on their ability, not age. To this end, AARP created a Worker Equity Initiative in 1985 to study and address issues affecting the employment of older workers. AARP has developed educational and advocacy programs to en-

courage and promote the employment of older workers. As part of its advocacy efforts, AARP has filed numerous *amicus curiae* briefs in the United States Supreme Court and the United States Courts of Appeals regarding the proper interpretation and application of the ADEA to insure that the rights of older workers are fully protected.[1]

Congress enacted the ADEA to protect individuals from arbitrary age discrimination. The most arbitrary form of discrimination is mandatory retirement. Studies consistently demonstrate that chronological age is a poor determinant of ability and that capability varies greatly among individuals. The ADEA's prohibition of mandatory retirement represents a national commitment to the principle that each individual—regardless of age—has the right to remain a productive member of society and to be judged on his or her individual abilities. For these reasons, AARP opposes mandatory retirement policies such as Missouri's requirement that its judges retire upon reaching age 70.

AARP submits this brief *amicus curiae*, with the consent of the parties,[2] urging the Court to reverse the decision of the Eighth Circuit below.

STATEMENT OF THE CASE

AARP adopts the Petitioners' statement.

[1] *See, e.g., Gilmer v. Interstate Johnson Lane Corp.*, No. 90-18, *cert. granted*, 111 S. Ct. 41 (1990); *Hoffman-LaRoche, Inc. v. Sperling*, 110 S. Ct. 482 (1989); *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854 (1989); *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). AARP also filed a brief *amicus curiae* arguing against the mandatory retirement of Vermont judges in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990).

[2] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Petitioners challenge the legality of Missouri's mandatory retirement provision for the majority of its state court judges. Mo. Const. art. V, § 26. Petitioners and AARP submit that compelling judges to retire at age 70 solely because of age violates the ADEA and the Equal Protection Clause.

The ADEA broadly protects state and local government employees from discriminatory practices. Section 630(f) of the ADEA excludes elected officials, and their personal staffs, their policymaking appointees, and their immediate advisers from coverage under the ADEA. Unless appointed state court judges fall within one of the categories expressly excluded by Section 630(f), they cannot be mandatorily retired.

The Eighth Circuit erroneously held that appointed judges are "appointees on the policymaking level" within the meaning of Section 630(f). This broad construction of Section 630(f) is unsupported by the statutory language and purpose of the ADEA and is contrary to pertinent legislative history of the identical exclusion from coverage in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e(f). The framework of the exclusions in Section 630(f) reveals that Congress intended to identify two related groups—elected officials and a select group of their appointees. The purpose of the exclusions was to shield elected state officials from the intrusion of a federal statute in the selection of individuals with whom the officials would work closely.

Nothing in the language, the structure, or the legislative history of the exclusions from the definition of employee suggests that Congress intended to exclude appointed judges from the reach of the ADEA. Judges do not fall within the type of "appointees" identified in Section 630(f), as they do not work closely with or for their appointing authorities. Indeed, judges must main-

tain a separate and independent relationship from the executive branch.

Nor do judges make policy—the judge's role is to resolve a concrete case or controversy, not to issue an advisory opinion. The role of a judge as part of the separate and independent judiciary branch of government simply does not fit within the meaning or purpose of an elected official's "appointee on the policymaking level" as defined by Section 630(f) of the ADEA.

Compelling both appointed and elected judges to retire at age 70 also violates the Equal Protection Clause of the Fourteenth Amendment. The State has singled out an arbitrary criterion, age 70, that denies older persons the right to continued employment. The purported reasons for the mandatory provision are as arbitrary as the selection of age 70 itself. These reasons rely on outdated and unfounded stereotypes about age and ability. Such stereotypes should no longer withstand constitutional scrutiny.

Mandatory retirement has been abolished for most employees under the ADEA, as empirical evidence and public policy establish that age is simply irrelevant to ability.[3] Missouri's continued use of age to terminate healthy and competent jurists has a devastating effect on those individuals and injures society as a whole. As such, it lacks a rational basis and violates the Equal Protection Clause.

[3] The ADEA permits the mandatory retirement of law enforcement officers, 29 U.S.C. § 623(j), and of tenured faculty at age 70, 29 U.S.C. § 631(d). These temporary exceptions expire on December 31, 1993. The Act also permits the mandatory retirement of certain bona fide or high policymaking executives eligible for an immediate pension of $44,000. 29 U.S.C. § 631(c).

ARGUMENT

I. APPOINTED STATE COURT JUDGES ARE NOT "APPOINTEES ON THE POLICYMAKING LEVEL UNDER THE ADEA."

The ADEA protects "employees" from arbitrary age discrimination in employment. The Act defines "employee" to mean "an individual employed by an employer. . . ." 29 U.S.C. § 630(f). There is no dispute that Missouri is an employer subject to the proscriptions of the ADEA. 29 U.S.C. § 630(b).[4] The only issue is whether appointed state court judges are employees within the definition established by 29 U.S.C. § 630(f).[5]

The ADEA's coverage of appointed judges may be ascertained by analyzing the statutory language of the Act, pertinent legislative history, and the particular circumstances of the instant case.[6] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The exceptions to the ADEA's protections are to be narrowly construed and the class of individuals who are entitled to the law's

[4] Appendix to Petition for Writ of Certiorari, A 20.

[5] Section 11(f), 29 U.S.C. § 630(f) reads, in relevant part:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. . .

[6] The question of whether appointed state court judges fall within the exception is one of federal law, rather than state law. State law is only relevant insofar as it describes the individual's position and accompanying duties. *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985).

protections as "employees" must be defined broadly. *EEOC v. First Catholic Slovak Ladies Assoc.*, 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983). Because arbitrary age limits are repugnant to the letter and spirit of the ADEA,[7] the mandate to narrowly interpret exceptions to the Act's protections is especially significant when, as here, an individual is being mandatorily retired. *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 410 (1985).

The broad definition of "employee" under the ADEA is explicitly limited by exceptions excluding certain persons in state and local governments from the protections of the Act. The exceptions identify two groups: elected officials and those individuals who work for the elected officials. For the latter group, Congress specifically described the type of employees selected by elected officials whom it intended to exclude from the reach of the Act:

> (1) any person chosen by such officer to be on such officer's personal staff, or
>
> (2) an appointee on the policymaking level, or
>
> (3) an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f).

The plain meaning and purpose of the exclusionary provisions in Section 630(f) demonstrate that Congress intended "to exclude state and local elected officials and *certain* non-civil service appointed officials." *EEOC v. Wyoming*, 460 U.S. 226, 233 n. 5 (1983) (emphasis added).

[7] 132 Cong. Rec. 32,658 (1986).

A. Judges Are Not Appointees Within The Meaning Of ADEA Section 630(f) Since They Do Not Work For An Elected Official.

The meaning of "appointee on the policymaking level" must be understood within the context of the categories described within the exception. The categories of individuals listed in the exclusions share a common thread —their relationship to an elected official. These individuals typically "work closely with and are accountable to the official who appointed them." *EEOC v. Vermont*, 904 F.2d 794, 800 (2d Cir. 1990). The framework and context of the exclusions make this relationship essential to determining the scope and meaning of "appointee on the policymaking level."

The placement of the category of policymaking appointees between the categories of personal staff and immediate advisers strongly suggests that the exclusion of policymaking appointees is limited to individuals who have a relationship with or are accountable to the elected official. The first and third categories of employees identified in Section 630(f) clearly describe individuals who work closely with the elected official. The placement of the appointee category within this framework indicates Congress' understanding that the three categories shared common characteristics. Otherwise, Congress would not have structured the exclusions in such an interrelated manner.

The legislative history of the identical provision in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e(f), supports the interpretation of the ADEA Section 630(f) as limited to appointees accountable to their elected official.[8] Congress enacted the identi-

[8] Senator Bentsen, the chief sponsor of the ADEA amendments to include state and local government employees, pointed to the parallel amendments to Title VII in 1972 as support for amending the ADEA. 118 Cong. Rec. 15,895 (1972). ("I believe that the principles underlying these provisions in the EEOC bill [Title VII]

cal exception for appointees under Title VII when it expanded the definition of employer to include state and local governments." The exception for elected officials arose because of congressional concern that by expanding the definition of employer in the bill, the amendment would be "broad enough to cover [employees such as] Governors of States, State Supreme Court justices, state legislators, and so forth." 118 Cong. Rec. 4096 (1972) (remarks of Sen. Ervin).

The evolution of the elected officials' exception and the three related categories reveals a clear purpose for the provision—to shield an elected official and those individuals "who are in a close personal relationship and an immediate relationship with him" from the scrutiny of the federal courts. 118 Cong. Rec. 4492-93 (1972) (remarks of Sen. Williams). Senator Ervin's initial amendment to the definition of employee excluded any elected officials and those who "advise him in respect to the exercise of the constitutional or legal powers of his office." 118 Cong. Rec. 4483 (1972) (remarks of Sen. Ervin). Senator Williams also proposed to exclude the personal staff of the elected official and the language was changed to add "any person chosen by such officer to be a personal assistant." 118 Cong. Rec. 4492-93 (1972). The Senate adopted this language; it became the first and third categories of the exception in the definition of employee. 42 U.S.C. § 2000e(f).

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are directly applicable to the Age Discrimination in Employment Act." *Id.* (remarks of Sen. Bentsen). The legislative history of the identical language in Title VII is therefore relevant to the interpretation of such language in the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *EEOC v. Ross*, 758 F.2d 581, 584 n.7 (11th Cir. 1985). The only difference between the ADEA and Title VII definitions of employee results from a 1984 amendment to the ADEA covering United States citizens employed overseas. Pub. L. No. 98-459, 98 Stat. 1767 (1984).

* Pub. L. No. 92-261, 86 Stat. 103 (1972).

Senator Javits repeatedly sought clarification and narrowing of the "adviser" phrase proposed by Senator Ervin. He expressed his concern that the phrase as written would encompass many employees who were not high level advisers:

> I realize that the Senator [Ervin] is seeking to confine it to the higher officials in a policymaking or policy advising capacity.

118 Cong. Rec. 4097 (1972) (remarks of Sen. Javits). This exchange precipitated the creation by the conference committee of the "middle category of persons excluded from the definition of employees, namely "appointees on the policymaking level." H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 2 (1972).

The addition of language identifying a select group of appointees on a policymaking level completed the categories of persons within the exclusion. This legislative history reveals a clear picture of whom Congress intended to exclude from coverage by the phrase "appointees on the policymaking level":

> those persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of state or local governments, such as cabinet officers.

H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 2, 15 (1972) (joint statement of managers); S. Conf. Rep. No. 681, 92d Cong., 2d Sess. 2, 15 (1972) (joint statement of managers) *reprinted in part in* 1972 U.S. Code Cong. & Admin. News 2179, 2180. Congress also admonished that "[t]his exemption should be construed narrowly." *Id.*

While Congress was aware that judges could be covered employees under Title VII, the legislative history reflects Congress' intent to restrict the scope of the appointees' provision with no indication that appointed judges would fall within the exception. To the contrary,

the deliberations on the exclusions of certain state and local government employees focused on the appointed staff, policymakers and advisers of elected officials in the executive branch. Nothing in the language or legislative history suggests that Congress intended to exclude every employee who was an elected official or to exclude appointed state judges.

An EEOC Opinion Letter concerning the applicability of the ADEA to state and local judges confirms the meaning and limited purpose of the excluded categories and is consistent with congressional intent. Equal Employment Opportunity Commission Opinion Letter No. 7 (April 7, 1987). The Opinion Letter describes several attributes of "appointees on the policymaking level" that are absent from the functions of an appointed state court judge. In EEOC's view,[10] Section 630(f) only applies to appointees who:

> a) have a "close personal and immediate relationship between the elected official and the appointee";
>
> b) act as "first-line advisers upon whom the elected official directly relies for advice. *See* 118 Cong. Rec. 4492-93 (1972) (remarks of Senator Williams and Senator Ervin)."
>
> c) "implement[] the day to day political policies of the elected executive or legislative body that appoints them."

Id.

An analysis of state judges' duties demonstrates that they do not fall within the exception for "appointees on the policymaking level" since they are not the type of executive "appointees" contemplated by 29 U.S.C. § 630(f). While state judges may be appointed by an elected official, any connection to the elected official essentially ceases after their appointment. Judges do not

[10] *See also EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988).

serve at the pleasure of the appointing authority. *See EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985). Judges are not advisers to the elected official. On the contrary, the role of a judge must be independent from the legislator. *See EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988).

B. Judges Are Not Policymakers Within The Meaning Of ADEA Section 630(f).

Even if arguendo, judges are included within the types of appointees contemplated by 29 U.S.C. § 630(f), they are not "policymakers" within the meaning of the ADEA.[11] The term "policy" within Section 630(f) logically connotes the policies of the elected official. EEOC Op. Letter No. 7.

Historically, the judiciary has been independent of and separate from both the legislative and the executive. *See Bowsher v. Synar*, 478 U.S. 714, 721-23 (1986); *Muskrat v. United States*, 219 U.S. 346, 355 (1911). This Court and the Missouri state courts have repeatedly reaffirmed the importance of maintaining the separation of powers.[12]

The separation of powers safeguards the impartiality of the adjudication process itself. *Northern Pipeline*

[11] In addition to the appointee on the policymaking level, the ADEA contains the term "policymaker" in an exception permitting the mandatory retirement of an employee in a bona fide executive or "high policymaking position" who is eligible for an immediate pension of $44,000. 29 U.S.C. § 631(c)(1). Respondent did not raise this exception below as it is inapplicable to the facts here.

[12] *Morrison v. Olson*, 487 U.S. 654 (1988); *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976) (*per curiam*); *State ex rel. Otto v. Kansas City*, 310 Mo. 542, 572 (Mo. 1925) ("The purpose of keeping the different branches separate had its origin in the framers' interest in preserving the liberty of the people."); *In Re Pate*, 107 S.W.2d 157 (Mo. Ct. App. 1937) ("The three governmental branches are each given certain inherent powers and each must be kept separate and operate in its own particular field").

Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982). The Framers sought to maintain the independence of the judiciary by limiting the exercise of judicial power to "cases" or "controversies." *See Morrison v. Olson*, 487 U.S. 654 (1988); *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395 (1980). Courts cannot entertain non-justiciable matters, nor are they permitted to issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). Missouri courts may not render advisory opinions. *International Telephone & Telegraph Corp. v. Smith*, 687 S.W.2d 194, 195 (Mo. 1985) (*per curiam*).[13]

In short, judges do not make policy.[14] They exercise their power almost exclusively by ruling on cases. In doing so, they apply the laws written and enacted by the legislatures.[15] A court may weigh policy factors and

[13] *State ex rel. Dahl v. Lange*, 661 S.W.2d 7 (Mo. 1983); *Ellsworth Freight Lines, Inc. v. State Tax Commission of Missouri*, 651 S.W.2d 130 (Mo. 1983), *cert. denied*, 465 U.S. 1001 (1984); *City of Fenton v. Twin City Fire Insurance Co.*, 780 S.W.2d 97 (Mo. Ct. App. 1989); *Wasinger v. Labor and Industries Relations Commission*, 701 S.W.2d 793, 794 (Mo. Ct. App. 1985).

[14] *Bader Realty & Investment Co. v. St. Louis Housing Authority*, 358 Mo. 747, 754 (1949) (Court determines question of power, not policy); *Brinkmann v. Common School Dist. No. 27 of Gasconade County*, 238 S.W.2d 1, 6 (Mo. Ct. App. 1951), *aff'd* 255 S.W.2d 770 (Mo. 1953) (It is the plain duty of courts to apply the law as written by the legislature and leave to that tribunal the matter of determining questions of legislative policy).

[15] Even in those instances when, in the course of adjudicating a case, the courts must interpret a silent or ambiguous statute, they must look to the legislative history for congressional intent or defer to the executive branch's construction of the statute. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233-34 (1986). In those rare instances when courts engage in nonadjudicatory activities such as rulemaking, they must rely on Congress to confer specific rulemaking authority on them. *See Mistretta v. United States*, 488 U.S. 361, 386-87 (1989); *Hannah v. Plumer*, 380 U.S. 460 (1965).

render decisions with policy implications, but the judge's role is limited to discerning the policies set by the executive or legislature, not to develop or make policy himself.[16] While deciding novel disputes may create law, making policy is quite different.

The members of Congress who drafted and enacted the appointees' exception were clearly cognizant of the role of the judiciary in our system of government.[17] Accordingly, to assume that Congress meant to include judges within the policymaking exception of the ADEA would mean that, without explanation, Congress enacted a law which is inconsistent with the long-established independent role of the judiciary in the American government.

The court below further erred in holding that Petitioners and apparently all state judges were policymakers based on the supervisory authority of some state judges to develop rules of professional conduct or policies for the resolution of disputes within the judiciary. *Gregory v. Ashcroft*, 898 F.2d 598, 602 (8th Cir. 1990).[18] The clear purpose of the appointee exception was to limit it to high level policymakers. Judge Gregory is an associate circuit judge. J.A. 3. Judge Gregory's supervisory authority is limited to his personal staff of one, and asso-

[16] *State v. One 'Jack and Jill' Pinball Machine*, 224 S.W.2d 854 (Mo. Ct. App. 1949) (The policy of legislative enactments is not for courts but for the legislature to establish).

[17] Senator Ervin, the lead author of the appointees' exceptions in Title VII, did not view judges as policymakers since they had "no discretionary power to fashion policies based on such considerations as expediency or prudence." S. Ervin and R. Clark, *Role of the Supreme Court: Policymaker or Adjudicator*, 1 (1970).

[18] Since municipal judges (who are at the lowest level in the Missouri court hierarchy) are not subject to mandatory retirement under the state constitution, Mo. Const. art. V, § 26, it is unlikely the court below viewed them as having supervisory authority.

ciate judges cannot even vote on local rules. Mo. Const. art. V, § 15. The motivating factor underlying the Eighth Circuit's construction of Section 630(f) is its view that Congress would not have intended to exclude elected judges while not also excluding appointed judges. Yet Congress plainly made this distinction in the statute. The reason for exempting all elected officials is because they are subject to selection by the electorate through the democratic process. Elected officials are "tested at the polls," 118 Cong. Rec. 4492 (1972), and Congress did not seek to interpose the federal courts in this process. However, this reasoning and purpose are inapplicable to appointed judges.

Missouri's requirement that its judges retire upon reaching age 70 presents a pointed example of the type of arbitrary discrimination that Congress sought to prevent by amending the ADEA to abolish mandatory retirement. Nothing in the ADEA or in pertinent legislative history supports a construction of the ADEA that denies appointed judges their rights as employees to be free from mandatory retirement. This Court should give full effect to the ADEA's definition of employee, its narrow exclusions from coverage, and the general prohibition against mandatory retirement.

II. MANDATORY RETIREMENT AT AGE 70 VIOLATES THE EQUAL PROTECTION CLAUSE.

The court below erred in holding that Missouri's mandatory retirement provision does not violate the Equal Protection Clause. While a classification based on age may not be subject to strict scrutiny by a court, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (*per curiam*), the court's review of a mandatory retirement provision must be more than a rubber-stamp approval. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985). The court below dismissed Petitioners' claims without any record evidence and without examining whether the relationship between mandatory retirement and a qualified judiciary is "so

attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. Because the State's reasons for imposing mandatory retirement are unsubstantiated and do not achieve the asserted objective, the age classification is not rational. *See Cleburne*, 473 U.S. at 448-49.

The State's reasons for mandatory retirement are based on unfounded stereotypes about older persons. Mandatory retirement is premised on the unsupported notion that people become mentally or physically incompetent at a certain chronological age. This prejudicial stereotype often results in arbitrary discrimination against older workers.

As the Court recognized in *Cleburne*,[19] a close examination of the asserted reasons for the classification is appropriate. In this case, the court below failed to examine whether the State's reasons were supported by data or by discriminatory stereotypes.

According to the court below, the asserted goal of mandatory retirement for judges at age 70 is "maintaining a highly qualified and vigorous judiciary." 898 F.2d at 605. The court reasoned that the legislature could assume that mandatory retirement serves this goal even if empirical evidence could show that age has no bearing on performance. The court below erred in denying Peti-

[19] In *Cleburne*, the Court held that a classification based on mental retardation, while not quasi-suspect, still warranted constitutional protection. 473 U.S. at 446. The Court closely examined the reasons articulated by the city for a zoning ordinance denying a special use permit for a proposed group home for the mentally retarded. 473 U.S. at 448-50. The Court emphasized that negative attitudes or unsubstantiated fears are not permissible bases for segregating the mentally retared. 473 U.S. at 448. The Court rejected each of the reasons set forth by the city, noting that "the record does not reveal any rational basis" that the segregation of mentally retared served the city's interests. *Id.* Rather, the Court concluded that the ordinance was based on irrational prejudices against the mentally retarded. 473 U.S. at 450.

tioners the opportunity to present such evidence. Moreover, without any factual support for the classification, the court should have invalidated the provision based on the standards applied in *Cleburne*, 473 U.S. at 450.

The court below relied on reasons set forth by the Missouri Supreme Court more than twelve years ago in *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978). The reasons asserted by the state for mandatory retirement at age 70 are:

> (1) a judicial system of the highest caliber "justifies the drawing of a line at an age at which there is often a lessening in mental and physical abilities;"
>
> (2) to avoid the tedious task of determining physical and mental qualifications after a certain age;
>
> (3) to increase opportunities for the young to enter the judiciary; and
>
> (4) to assure predictability and ease in administering pension plans.

Gregory v. Ashcroft, 898 F.2d at 605 (citing *O'Neil v. Baine*, 568 S.W.2d at 766-67). These reasons are premised on prejudicial stereotypes about older persons and are not legitimately related to the mandatory retirement of judges at age 70.

Medical research flatly contradicts the first assertion of a normal decline in mental capability at age 70.[20] While the unsupported belief in an overall decline in mental functioning with age existed at the time of the decisions in *Murgia* and *O'Neil*,[21] accepted studies now

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[20] Since mental capacity, not physical ability, is the primary qualification for a judge, this section focuses on medical research involving mental processes and aging.

[21] McEvoy & Cascio, *Cumulative Evidence of the Relationship Between Employee Age and Job Performance*, 74 J. of Appl. Psych. 11 (1989).

show no decline in average intelligence at least until age 80.[22] In fact, recent research demonstrates that some intellectual functions may even improve with age.[23] According to Dr. T. Franklin, Director of the Public Health Service, Department of Health and Human Services at the National Institute of Health, "New research demonstrates that, in the absence of disease conditions, functioning in the various organ systems can be maintained at high levels into these later years [70s and 80s]."[24]

The State's reasons for mandatory retirement become suspect when viewed against the State's practice of retaining judges after age 70 "with the same powers as an active judge." Mo. Const. art. V, § 26(3). Even after reaching age 70, any retired judge may be granted senior status and retain all of the authority and receive the same compensation he did prior to reaching the mandatory retirement age. *Id.*[25] The State's willingness to continue to employ retired judges undermines the validity of its concern about the ability of older judges to perform competently.

Given the clear weight of contradictory data, the State's "outmoded notion of the relative capabilities," of judges at age 70 is irrational. *Cleburne*, 473 U.S. at 441.

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[22] Schaie, "The Seattle Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood" in *Longitudinal Studies of Adult Psychological Development* 33 (K.W. Schaie ed. 1983).

[23] Staudinger, Cornelius & Baltes, *The Aging of Intelligence: Potential and Limits*, 503 The Annals 43, 45 (1989).

[24] *The Removal Of The Age Ceiling Cap Under The Age Discrimination In Employment Act: Joint Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 99th Cong., 2d Sess. 26 (1986).

[25] In the same year as Petitioners filed this suit, Missouri enacted a provision taking away the "annual compensation, salary, and retirement compensation" of any judge who failed to retire at age 70. Mo. Rev. Stat. § 476.683 (1988).

Age simply bears no relationship to performance.[26] A line drawn at age 70 is as arbitrary and irrational as a line drawn at 40.

The second reason asserted by the State is also irrational and too attenuated to be served by mandatory retirement. The State seeks to avoid individual determinations of mental and physical disability by using age as the cut off for having to make such determinations. Yet, the State has created a mechanism for the specific purpose of providing individual determinations of a judge's fitness for office, particularly in the case of retirement and disability.[27] The State's asserted desire to avoid such individual determinations for judges at age 70 or older is inconsistent with their actual policy and practice.

The premise of this second reason is that old age is correlated to mental or physical incompetence, which the State assumes would be too burdensome to determine on an individual basis. The premise is not only unfounded, but its application results in the needless exclusion of a majority of productive and capable employees based on an assumption that a few older workers may no longer be competent. Congress has made it clear that society shall not deny employment opportunities to an individual based on generalizations or stereotypes about a group to which the individual belongs.[28] In other words, Congress has determined that public policy requires the individual-

[26] McEvoy & Cascio, *Cumulative Evidence of the Relationship Between Employee Age and Job Performance*, 74 J. of Appl. Psych. 11 (1989).

[27] The Missouri Constitution art. V, § 24 creates a commission on retirement, removal, and discipline to determine whether certain judges shall remain on the bench. Upon complaint and investigation, the commission may recommend the removal, suspension, discipline or reprimand of any judge. Mo. Const. art. V, § 24.

[28] H.R. Rep. No. 756, 99th Cong., 2d Sess. 5-6 (1986).

ized treatment of older employees, which the State seeks to avoid here.

The third premise of the mandatory retirement provision is to purportedly provide opportunities for the young. Demographic changes showing a significant decline in the number of youth entering the labor market[29] bring into question the continued legitimacy of this reason. Without an available pool of qualified candidates for the judiciary, the loss of experienced older judges may actually harm the State's objective of maintaining a highly qualified judiciary.

Finally, the State's assertion that mandatory retirement aids the administration of pension plans is so attenuated as to be arbitrary and irrational. *Cleburne*, 473 U.S. at 446. A normal retirement age at which a full pension is payable is key to pension plan administration, not a mandatory retirement age. Missouri, like most states, administers a pension plan covering a majority of its employees who cannot be mandatorily retired at age 70 because of the ADEA. Nothing in the record or in practice suggests that a mandatory retirement age makes Missouri's pension plan for its judges any easier to administer than its plan for any other group of state employees.[30]

Times have changed considerably since the days when mandatory retirement was presumed to be rational. "What was once a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential." *Cleburne*, 473 U.S. at 466

[29] W.B. Johnson & A.H. Packer, *Workforce 2000: Work and Workers for the 21st Century* (1987).

[30] If ease of administration was a legitimate concern, the State could require mandatory payout of pensions at age 70, regardless of retirement status, similar to that required for private sector employees at age 70½ by the Tax Reform Act of 1986, 26 U.S.C. § 401(a)(9)(c).

(Marshall, J., dissenting). Congress has condemned mandatory retirement as arbitrary, wasteful, and harmful to the individual and society.[31] Advances in medical science demonstrate that age is not an accurate predictor of mental or intellectual ability. These are sizeable differences between adults and the process of intellectual change. "[P]ersons of the same chronological age are not identical as to their mental status. There are 70-year-olds who function like 30-year-olds and vice versa." [32]

The time has come to more closely examine age classifications that disadvantage older workers. Congress has found that older persons continue to face widespread, arbitrary discrimination in employment based on stereotypes that are irrelevant to their abilities.[33] Just as race or gender are irrelevant to one's ability to perform, age has no relation to one's ability to perform.[34] Old age is similarly immutable, since once an individual reaches a chronological age there is obviously no turning back.[35]

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[31] "[M]andatory retirement based solely upon age is arbitrary and [] chronological age alone is a poor indicator of ability to perform a job." *See* H.R. Rep. No. 527, 95th Cong., 1st Sess. part 1, 2 (1977). "Forced retirement of people solely on the basis of chronological age is a waste, unscientific in its background, and tragic in its consequences." *Retirement Age Policies, Part I: Hearings Before the House Select Comm. on Aging*, 95th Cong., 1st Sess. 15-16 (1977) (statement of Dr. Irving Wright).

[32] Staudinger, Cornelius, & Baltes, *The Aging of Intelligence: Potential and Limits*, 503 The Annals 43, 45-46 (1989).

[33] *Working Americans: Equality At Any Age*, Staff Report of the Senate Special Comm. on Aging, 99th Cong., 2d Sess. 1 (1986). This congressional finding questions the contrary premise of *Murgia* that older persons have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313.

[34] Wadman & Avolio, *A Meta-Analysis of Age Differences in Job Performance*, 71 J. of Appl. Psych. 33 (1986).

[35] *O'Neil v. Baine: Application of Middle-Level Scrutiny to Old Age Classifications*, 127 U. Pa. L. Rev. 798, 808 (1979); *Age Discrimination in Employment*, 50 N.Y.U.L. Rev. 924, 930 n.37 (1975); *Constitutional Attacks on Mandatory Retirement: A Reconsideration*, 23 UCLA L. Rev. 549, 549 n.5 (1976).

The devastating effects of mandatory retirement on the individual and society cannot be overemphasized. Mandatory retirement condemns individuals to "an idleness that hastens their decline." [36] It is "a cruel blow to the dignity and self-respect of one who has devoted his life to productive work, and takes a dramatic toll." *Rogers v. Exxon Engineering*, 404 F. Supp. 324, 329 (D.N.J. 1975). "The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression." [37] Forced retirement, not age, can be the cause of a significant decline in mental and physical ability. When individuals have the opportunity to remain active and involved, they are able to maintain and even enhance their intellectual functioning in old age.[38]

As Congress has recognized, it is difficult to reconcile the reasons for mandatory retirement with the reality of varying abilities at the same age. Indeed, Justice Oliver Wendell Holmes served with distinction on this Court into his nineties. *See* 132 Cong. Rec. 32,658 (1986) (statement of Sen. Metzenbaum). Justice Holmes' distin-

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[36] McDougal, Lasswell & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 29 U. Fla. L. Rev. 639, 642 (1976); Somers, *Social, Economic, and Health Aspects of Mandatory Retirement*, 6 J. of Health, Politics, Policy & Law 542, 547 (1981) (Studies show that the mortality rates of older persons increased after involuntary retirement).

[37] McDougal, Lasswell & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 29 U. Fla. L. Rev. 639, 641 (1976).

[38] Schaie, "The Seattle Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood" in *Longitudinal Studies of Adult Psychological Development* 33 (K.W. Schaie ed. 1983); Arbuckle, Gold, & Andres, *Cognitive Functioning of Older People in Relation to Social and Personality Variables*, 1 Psych. and Aging 55 (1986).

guished career makes a telling point—that ability, not age, is the most accurate measure of performance.

CONCLUSION

For the foregoing reasons, AARP urges the Court to reverse the decision of the Eighth Circuit. AARP respectfully requests that the Court hold that the mandatory retirement of appointed state court judges violates the ADEA and that the mandatory retirement of both elected and appointed judges violates the Equal Protection Clause.

Respectfully submitted,

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In The

Supreme Court Of The United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR., AND ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CONNECTICUT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE STATE OF CONNECTICUT

Connecticut's constitutional court structure could be affected by this appeal.[1]

Connecticut also has an evidentiary record concerning some of the key issues before the Supreme Court. This evidence may not be present in other cases of this nature, and may assist this Court. *See* Appendix.

Judges of all courts in the State of Connecticut, except Courts of Probate, are not elected. They are nominated by the Governor exclusively from candidates submitted by the Judicial Selection Commission. Conn. Const., Art. Fifth, § 2.

The judges nominated are appointed by the General Assembly for an eight-year term. *Id.* Because of their method of appointment, these judges are not exempted as elected officials under 29 U.S.C. § 630(f) of the Age Discrimination in Employment Act (ADEA).

The Constitution of Connecticut, furthermore, provides that:

> No judge shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice or judge of the supreme court, a judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee.

Art. Fifth, § 6, as amended by Art. VIII, § 2 of the Constitutional Amendments.

State referees may hear specified civil cases and shall exercise the powers of the Superior Court with respect to trial, judgment and appeal. Section 52-434(a), Conn. Gen. Stat. A referee may also hear adversary cases if designated a trial

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[1] This brief is submitted pursuant to Rule 37.5, Rules of the United States Supreme Court.

referee by the Chief Justice. That term is for one year, § 52-434(b), Conn. Gen. Stat.

The Connecticut judicial framework as set forth above is directly implicated by the petitioners' demands.

In fact, a temporary restraining order was issued against the Connecticut Judicial Department, the Chief Justice of Connecticut, Ellen A. Peters, and the Chief Court Administrator, Judge Aaron Ment, by the U.S. District Court, District of Connecticut (Cabranes, J.), on August 15, 1989, prohibiting them from removing a State Judge when he became 70. *Robert Satter v. The Connecticut Judicial Department, Ellen Peters and Aaron Ment,* Civ. No. H-89-525 (JAC). It is the relevant evidence from this case which we submit in the Appendix.

SUMMARY OF ARGUMENT

The ability of our State to structure one of her most basic institutions, the judicial branch of government, as the people deem best, is at issue here. This question also affects virtually every other State of the Union.

The evidence in the Connecticut case demonstrates how legitimate public interests of a State can be injured by striking down the State Constitutional provisions involved.

In addition, there is no clear and manifest Congressional intent to preempt the judicial tenure laws involved.

The relevant legislative history, furthermore, indicates that State judges, both elected *and* appointed, were intended to be exempt.

They are also inextricably involved in formulating state judicial policy.

What is at stake are the " 'tacit postulates' " of federalism which ensure that the existence of the States is a meaningful one. *See* L. Tribe, *American Constitutional Law,* § 5-22, at 397 (2d ed. 1988).

We are dealing with a core State determination concerning her judiciary system. This directly implicates "the

constitutional equilibrium between the general and the State governments." *The Federalist* No. 31, at 197 (A. Hamilton) (Mentor ed. 1961).

ARGUMENT

I. THERE IS NO CLEAR AND MANIFEST CONGRESSIONAL INTENT TO PREEMPT STATE CONSTITUTIONAL AND OTHER PROVISIONS CONCERNING TENURE OF STATE JUDGES.

A. PETITIONERS' CLAIMS STRIKE AT THE HEART OF SELF-GOVERNMENT BY THE STATES.

1. The Tenure Of State Judges Is Of Great Importance To A State.

The Court of Appeals correctly recognized that "the tenure of state judges is a matter of considerable importance to a state, and one that traditionally has been left to each state to regulate . . . ." *Gregory v. Ashcroft,* 898 F.2d 598, 600 (8th Cir. 1990). As the First Circuit has acknowledged, the ADEA should not "overrule the clear intent of the people of a state in an area intimately and fundamentally related to that state's self-governance." *E.E.O.C. v. Commonwealth of Mass.,* 858 F.2d 52, 53 (1st Cir. 1988). The tenure of state judges is a question of great interest to each state. *Id.* "Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very close to the heart of state sovereignty." *Id.*

2. The Testimony In The Connecticut Case Shows The Adverse Impact That Invalidation Of State Constitutional Provisions Concerning Judicial Tenure Can Have.

The adverse impact on the State's judicial system of invalidating State Constitutional provisions for retirement is shown by evidence in the Connecticut case.

In that proceeding, the Chief Court Administrator of Connecticut, Judge Aaron Ment, testified. As Chief Court Administrator, he oversees the day-to-day administration of the Judicial Department, including the assignment of judges. App., 11A.

A major part of his responsibility is to deal with the legislature. App., 17A. He has had discussions with the State legislature concerning the effects of court invalidation of the state judicial retirement provisions. App., 18–19A. These discussions have been with the Judiciary Committee as well as the legislative leadership. App., 19A.

He was asked:

> Q. Now, based on your experience and your knowledge, and your work with the General Assembly, what effect, if any, do you anticipate there would be on the State Judicial Department if the provision concerning mandatory retirement of judges at age 70 were to be struck down?
>
> * * * *

He testified:

> A. There are several probable responses by the General Assembly.
>
> The first I believe would be for them to re-examine the constitutional provision for eight year terms. It has been suggested several times that they feel that if, in fact, the present constitutional basis for the eight year term is invalid, they would review that with the idea of shortening the term to allow them to have a more frequent review of the judges.
>
> Q. Now, why would they want to shorten the term?
>
> A. They would want to shorten the term because they would feel that an eight year term would be too long in view of what they consider to be the higher degree of likelihood of infirmity at later ages. App., 19–21A.
>
> * * * *

> A. All right. What effect would that have on judicial independence?
>
> * * * *
>
> A. The shorter the term, the more difficult the issue of judicial independence becomes.
>
> We already have a situation where many judges are concerned, especially in the two or three years prior to their reappointment. Several judges recently were not reappointed by the General Assembly, and the difficulty of balancing independence versus accountability is one that we struggle with every day.
>
> The shorter the term, the more weight there is on the accountability side, the less weight on the independence side, and I have great concern that the judicial independence in Connecticut would be lessened. App., 24–25A.

The claim that this problem could somehow be avoided by some type of administrative review (*See, e.g.*, Petitioners' Brief, pp. 29–30) is illusory.

As the First Circuit stated, this would require states "to take up the perilous task of evaluating the performance of its older judges, and impeaching" or otherwise removing them. 858 F.2d at 57. This "task is as undesirable as it is difficult." *Id.* It requires close legislative and executive scrutiny of judges. As a result, judicial independence is lost. *Id.* These methods of removal are also extraordinary ones, not suited for the normal " 'discharge for cause.' " *Id.*

This is also corroborated by Judge Ment's testimony:

> Q. Why can't the legislature rely on some of these other methods to deal with these problems, such as the Judicial Review Council, and the impeachment process, and the removal by address of the General Assembly, two-thirds, I believe?
>
> A. Those processes are deliberately made cumbersome and difficult to use, as they should be.

When those methods are used, and they've been used infrequently to my knowledge, the entire bench suffers. And I think the legislature realizes this and is reluctant to use them and reluctant to rely upon them. App., 25A.

For example, the State Judicial Review Council first must conduct a confidential probable cause investigation and hearing. Section 51-51l(a), Conn. Gen. Stat. If probable cause is found, a full hearing with right to counsel, presentation of evidence, and cross-examination is held. *Id.* at § 51-51l(c).

This hearing shall be public. *Id.*

Furthermore, these removal systems as a practical matter would require that public harm had occurred before they could be used. The same is true for impeachment and removal by the Governor on legislative address. *See* Conn. Const., Art. Fifth as amended by Art. XI, Const. Amend.; Art. Ninth; *see also* Conn. Gen. Stat. §§ 51-51j, 51-51n(a) (Judicial Review Council).

The anguish, delay, burden and the inevitable embarrassment to the judiciary and stigma to the judge himself that these removal procedures entail are well recognized. *Malmed v. Thornburgh*, 621 F.2d 565, 568-73, 578 n.19 (3d Cir. 1980), *cert. denied*, 449 U.S. 955 (1980), and cases cited therein; *Trafelet v. Thompson*, 594 F.2d 623, 628 (7th Cir. 1979), *cert. denied*, 444 U.S. 906 (1979); *State ex rel. Keefe v. Eyrich, et al.*, 22 Ohio St. 3d 164, 489 N.E. 2d 259, 261 (1986); *Aronstam et al. v. Cashman*, 132 Vt. 538, 325 A.2d 361, 364-66 (1974). All these decisions upheld State mandatory retirement provisions for judges against various constitutional and other attacks.

Invalidating State Constitutional provisions for judicial tenure could impair other state interests as well, Judge Ment testified.

A. We would be limited in the number of judges or in the number of individuals that we would have available to us to perform the necessary functions of the court.

For example, it would be less likely that we would have as many referees as we now have. And the referee program as it now is constituted is really a two-for-one.

We have the use of the referee when that referee cares to work, which in 39 instances is fairly often during the year. And we also receive a replacement judge. We would not have that under the other theory.

Q. Now, would this have any — apart from that, would this have any effect on the issue of judicial turnover?

A. One of the things that we're looking for is to make the bench more representative of the society in which we live. There would be less turnover. There would be less turnover, less opportunity for women and minorities to enter the system. App., 25-26A.

3. ADEA Control Over Appointed Judges Could Create An Undesirable Pressure To Revert To Elections For Judges.

There is an additional major injury to legitimate state interests involved in this case: pressure to revert to elections as a way of selecting judges. The Court of Appeals rightly noted that if the ADEA controlled appointed judges, "it would create an incentive for Missouri [or any other State] to . . . . return to selecting all its judges through a purely elective process." 898 F.2d at 603.

This would "introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have state judges appointed." *Id.*

Any distinction, moreover, between elected and appointed judges for the purpose of exemption from the ADEA is "nonsensical in terms of furthering the balancing intended by Congress." *Massachusetts*, 858 F.2d at 57.

Such a distinction would produce especially irrational results in those states where some judges are elected and others appointed, and also where judges are initially appointed and later elected. *See* Council of State Governments, 27 *Book of the States* Table 4.4 at 163-65 (1988-89 ed.). In Connecticut, for example, Probate Judges are elected while all other judges are appointed. Conn. Const. Art. Fifth, §§ 2 and 4.

There is no justification to exempt the Probate Judges, whose jurisdiction is limited, but not the constitutional judges of courts of general jurisdiction, i.e., the Superior Court.

4. The Right Of Each State To Select Its Own Method Of Judicial Tenure Is Essential For State Self-Government.

The pressure to revert to elections for all judges would be a major intrusion on state self-government. "This Commonwealth has never wavered from the principle that an independent and competent judiciary can best be achieved and maintained by the appointment, rather than by the election of judges." *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 517 N.E.2d 141, 145 (1988).

The same is equally true for not only Connecticut, but also the United States. *See* U.S. Const., Art. II, § 2, cls. 2, providing for appointment of judges.

As Judge [later Chief Justice] Ernest A. Inglis stated, "Certainly the method by which judges are selected and the term prescribed for their tenure do have a substantial bearing" on obtaining the best judiciary system. Inglis, *The Selection and Tenure of Judges*, 22 Conn. Bar J. 106, 118 (1948). Selection by popular election jeopardizes judicial independence. *Id.* at 115. "That selection is, in most cases, made by the political boss . . . . How untrammeled can a judge be under those circumstances?" *Id.*

The mode of appointment of federal judges was deemed important enough to our country to be discussed specifically in the Federalist papers. *The Federalist* No. 78, at 464

(A. Hamilton) (Mentor ed. 1961); *id.* No. 39, at 242 (J. Madison). It is of equal importance to the states.

There is nothing to suggest that Congress sought to compel the States to elect judges in order to require their retirement at a maximum age. *See Apkin*, 517 N.E.2d at 146. In fact, the framers of the Constitution left to the several States a "residuary and inviolable sovereignty over all other objects" not vested in the national government. *The Federalist, supra*, No. 39, at 245 (J. Madison). The jurisdiction of the latter embraced "certain enumerated objects only." *Id.*

The powers reserved to the several States "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* No. 45, at 293 (J. Madison). The States retain "a very extensive portion of active sovereignty . . . ." *Id.* at 290. *See also id.* No. 32, at 198 (A. Hamilton).

The existing republican forms of government continued by the States are guaranteed. *Id.* No. 43, at 275 (J. Madison). "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter." *Id.*

We must remember that the division of power in "the compound republic of America" is "a double security" for the rights of the people. *Id.* No. 51, at 323 (J. Madison).

Accordingly, it is well established that " '[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' " *Sugarman et al. v. Dougall*, 413 U.S. 634, 647 (1973).

> And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy

> perform functions that go to the heart of representative government.

Id.

There are fundamental limitations, moreover, on the powers of federal courts "to restructure the operation of local and state governmental entities." *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976). Nor may the Constitutional guaranties, including that of a republican form of government (Art. IV, § 4), " 'be manipulated out of existence.' " *See Kelley v. Metropolitan County Board of Education*, 836 F.2d 986, 997 (6th Cir. 1987), *reh'g denied* (1988), *cert. denied*, 487 U.S. 1206 (1988).

This applies with special force to the right of the people to constitute an independent state judiciary.

> The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice, within each state, according to its laws, on all subjects not entrusted to the federal government . . . . [are] the peculiar and exclusive provence and duty of the State Legislatures.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798).

Our constitutional system recognizes that "a separate and independent judiciary is an indispensable element of a republican form of government." *See Bauers v. Heisel*, 361 F.2d 581, 588 (3d Cir. 1965), *cert. denied*, 386 U.S. 1021 (1967). The National Government, at least in the absence of extraordinary circumstances not present here, may not " 'prevent a state from discharging its ordinary functions of government.' " *United States v. Downey*, 195 F.Supp. 581, 585 (S.D. Ill. 1961). This includes the functions of state courts. *Id.*

The situation of a Superior Court Judge, then, is a far cry from that of the game warden involved in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983). Even in *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 556 (1985), the Court recognized that there might be "affirmative limits [which] the constitutional structure might impose on federal action affecting the States under the Commerce Clause." It did not

have to define those in that case. The Court cited, however, *Coyle v. Oklahoma*, 221 U.S. 559 (1911). That case recognized that states were " 'endowed with all the functions essential to separate and independent existence.' " *Id.* at 580.

In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court upheld a Congressional bar on unregistered state and local bonds, stating: "Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." However, the federal law in that case had only "a *de minimis* impact on the States" and did not substantively restrict their ability to raise funds. *Id.* at 1370. (Rehnquist, C.J., concurring).

The Court in *South Carolina* did not completely foreclose the possibility that "the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." *Id.* at 1361. The decision cited for this, *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982), recognized that "having the power to make decisions and to set policy is what gives the State its sovereign nature." Requiring states to restructure their constitutional method for selecting their judiciary by converting to elections raises the most serious questions under the Constitutional balance. The same is true for virtually compelling states to replace uniform judicial retirement policies with stigmatizing, self-defeating removal investigations and hearings.

B. THE LACK OF A CLEAR CONGRESSIONAL PREEMPTION STATEMENT, THE FEDERAL-STATE BALANCE AND THE LEGISLATIVE HISTORY ALL INDICATE THAT THE STATE JUDICIARY PROVISIONS NOT BE STRICKEN.

1. Congress Must Have Clearly Stated Its Intent To Exercise Its Commerce Clause Power Fully And To Preempt State Laws Before It Will Be Presumed To Have Done So.

Commerce clause legislation must be consistent with the Bill of Rights. *Tribe, supra*, § 5-8, at 316. "Moreover, congressional exercises of the commerce power trigger a judicial

approach to statutory construction which reinforces the political checks of pluralism and federalism . . . ." *Id.* "A law will not be held to affect all the activities Congress in theory can control unless statutory language or legislative history constitutes a *clear statement* that Congress intended to exercise its commerce power in full." *Id.* (Emphasis by Tribe).

The Supreme Court has held that " 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance.' " *Heublein, Inc. v. South Carolina Tax Comm'n.*, 409 U.S. 275, 281-82 (1972), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). Nor will Congress be deemed to have authorized its delegates to do so either. *Bowen v. American Hosp. Assn.*, 476 U.S. 610, 644 (1986). This is not a case where otherwise the purpose of the act would be defeated. *See id.* We are only dealing with judges.

As the Court also noted in *Bowen:*

> "Where Congress has not clearly indicated a purpose to precipitate conflict [between federal agencies and state authority] we should be reluctant to do so by decision." (footnote omitted) . . . "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous."

Id. at n.33. (Citations omitted.)

These principles apply with special force to preemption. There is "an overriding reluctance to infer preemption in ambiguous cases." Tribe, *supra*, § 6-25, at 479. The exercise of federal supremacy is not lightly presumed. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981). It is a "basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Furthermore,

> When Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

California v. ARC America Corp., ___ U.S. ___, 109 S.Ct. 1661, 1665 (1989) (citation omitted).

Here, too, we are in a traditional state area. In *Malmed*, the Court recognized that about half the states had maximum age retirement provisions for judges, with 70 years the most common. 621 F.2d at 586.

Upholding another matter of state traditional regulation, a wage protection law, this Court recently stated:

> Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co. v. Coyne*, 482 U.S., at 19, 107 S.Ct. at 2221.

Massachusetts v. Morash, ___ U.S. ___, 109 S.Ct. 1668, 1675 (1989). *Cf. Dellmuth v. Muth*, ___ U.S. ___, 109 S.Ct. 2397, 2400 (1989) (" 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.' ").

Furthermore, " 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' " *Public Citizen v. United States Dept. of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2572 (1989).

These considerations are most important, for the Second Circuit, in a case relied on by petitioners, acknowledged that "the meaning of this part of the definition [the very one in question] is not entirely clear . . . ." *E.E.O.C. v. State of Vermont*, 904 F.2d 794, 797 (2d Cir. 1990).

Petitioners themselves, moreover, admit that the policymaking level exemption is "capable of differing shades of meaning." Petitioners' Brief, p. 17.

2. The Policymaking Level Exemption Is A Separate One Which Must Be Given Meaningful Effect.

Petitioners claim that the policymaking level exemption of 29 U.S.C. § 630(f) is merely a "sandwiched" one which should be limited only to those who have an extremely close working relationship with an elected official. Pet. Brief, p. 17. *See also Vermont*, 904 F.2d at 798.

The difficulty with this assertion, first, is that it would exempt an immediate but subordinate advisor in respect to constitutional or legal powers, but not the independent judge who decides those powers.

It would also exempt relatively low level positions such as the personal staff or immediate advisor to a Probate Judge, City Treasurer, Town Clerk or Registrar of Voters — all of whom can be or are elected in Connecticut — but not the Superior Court, a constitutionally established court of general jurisdiction which exercises the judicial power of the State.

Congress presumably did not intend to produce such unreasonable results or absurd laws. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982); *Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 677 (2d Cir. 1985); 2A Sutherland, *Statutes and Statutory Construction* § 45.12 (4th ed. 1984).

The First Circuit correctly rejected a claim similar to petitioners', stating:

> The Commission also argues that to fit within the third exception to the definition, the appointees must be "an elected official's first line advisers." This argument rests in part on the Commission's apparently unintentional misreading of the [Title VII] conference managers' report. The report actually reads:
>
> > It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisers *or* to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees' intent that this exemption shall be construed narrowly.
>
> Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., reprinted in part in 1972 U.S. Code Cong. & Admin. News 2137, 2179, 2180 (1972). The underlined "or," originally omitted by the appellant, makes it clear that Congress intended two categories: policymakers, who need not be advisers; and advisers, who need not be policymakers.

Massachusetts, 858 F.2d at 55-56 (emphasis by the Court).

As the Court also recognized:

> Each judge, once appointed, and no matter how lowly, is expected to act independently from his or her appointer. This difference does not act to preclude application of the "policymaker" exception to the judiciary, it simply calls for a slightly different understanding of who is a policymaker for purposes of the exception. *Id.* at 56.

It is also significant that the Conference Report, quoted by the Court, *supra*, did *not* "sandwich" this exemption between the other two.

Although the Conference Report did refer to an example of a policymaking position "such as cabinet officers," this was illustrative, and not restrictive by its own language.

The extension of policymaking to positions of "comparable responsibilities at the local level" shows how irregular it would be to exempt a town public works or parks and recreation director, for example, but not a State Superior Court Judge who exercises the powers of a state-wide constitutional court of general jurisdiction.

In addition, a State Commissioner of Economic Development, for example, who is appointed by the Governor, serves at his or her pleasure and whose policies he or she executes is exempt. A Superior Court Judge, however, who has com-

plete judicial independence, who can invalidate unlawful executive action, and whose decisions are reversible only on appeal would not be exempt, under Petitioner's reading. This would also be an absurd result.

The First Circuit also ruled:

> [T]he narrow construction mentioned by the conferees, on which the appellant's brief relies so heavily, is clearly intended to limit the reach of the exception down the chain of command, and not so much across agencies or departments. This is evident from the very language of the conferees, who placed no restrictions on the number of agencies or departments covered, but limited the positions covered to those at the highest levels. Clearly, each judge, as a separate and independent judicial officer, is at the very top of his particular "policymaking" chain of command, responding, if we can call it that, only to a higher appellate court.

Id. at 56.

3. The Title VII Legislative History Made Clear References To State Judges, Elected *Or* Appointed.

The Second Circuit, moreover, was incorrect in stating that with the exception of one earlier reference in the Title VII history, "the judiciary was never mentioned again, and there was no discussion indicating that Congress intended to place appointed judges in the excluded category of policymakers." 904 F.2d at 800.

Senator Ervin, who with Senator Allen later offered the amendment which dealt with the State Officer exception, stated:

> There is not even an exception in the [unamended] bill to the effect that the EEOC will not have jurisdiction over the Governor of a State or the Lieutenant Governor of a State, or both; statewide election officials; *State judges, whether they are elected or appointed to office;* clerks of superior courts of counties and their assistants; sheriffs of counties or their assistants; and the chiefs of police of municipalities. The bill would give the EEOC jurisdiction, even, over members of school boards, *certainly where they are appointed.*

118 Cong. Rec. 1677 (1972) (emphasis added).

Although he referred to State "supreme court justices" as also being subject to the bill, *id.* at 1838, 4096, he did not limit his remarks to them. He criticized giving the EEOC "the ultimate power to determine who a State *or a political subdivision* of a State can appoint or employ to exercise the legislative, executive, and *judicial powers* of a State." *Id.* at 1677 (emphasis added). This would refer to local appointment of municipal judges, for example.

He asked whether the bill included "the supreme court justices of the State" *and* the "other men who exercise executive and judicial power." *Id.* at 1811.

He further asked if "the bill in its present form would give Federal district courts the ultimate power to compel States and subdivisions of States to yield to their decrees with respect to the employment of persons who exercise the legislative, executive, *and judicial powers* of the States *and* political subdivisions of States?" *Id.* at 1838 (emphasis added).

Senator Taft, who was a member of the Senate Labor and Public Welfare Committee which had reported out the bill, stated that he did not intend to include elected officers, and that he "would be quite willing to go considerably further and perhaps to cover other personnel as well, and to cover those at the top decisionmaking levels in the executive *and* judicial branch as well." *Id.* (emphasis added).

Senator Ervin then offered several amendments, one of which, also cosponsored by Senator Allen, was adopted with modifications. It exempted elected officials, persons they chose as personal assistants and their immediate advisors concerning constitutional or legal powers. Amendment No. 888, *id.* at 4095, 4493.

It did not contain the present exemption at issue, i.e., "an appointee on the policymaking level."

The amendment would include members of a Governor's cabinet. *Id.* at 4493. (Discussion by Senators Williams, Ervin and Javits). The Ervin-Allen amendment (No. 888) as modified was then adopted — still without the phrase, "appointee on the policymaking level." *See id.* at 4493, 4494. The bill then passed the Senate with this amendment. *See id.*

The House bill, however, had not expanded the coverage of Title VII. *See* 1972 U.S. Code Cong. & Admin. News, *supra* p. 15, at 2180. The House receded with an amendment that added an exemption. As Congressman Erlenborn, one of the House Managers, stated:

> In the other body, an exemption was made for elected officials and immediate legal advisers. In the conference, an additional qualification was added, exempting those people appointed by officials at the State and local level in policymaking positions.

118 Cong. Rec. at 7567. Congressman Perkins, who called up the conference report, stated that the conference exempted "elected officials and persons chosen by such officials to work on their personal staffs, *as well as* appointees to policymaking positions at the highest level of the department or agency of the State or local government." *Id.* at 7563 (emphasis added).

He stated that the intention was to exclude cabinet members and persons with comparable local responsibilities. *Id.* However, the conference report itself, while mentioning these positions, is not limited to them. *See* 1972 U.S. Code & Admin. News, *supra* p. 15, at 2180.

Furthermore, the Ervin-Allen Amendment — without the policymaking level appointee exemption — was already deemed to cover cabinet members. *See* 118 Cong. Rec. 4493. Therefore, it is a reasonable inference that the latter exemption, added in the conference, while including cabinet members, was by no means restricted to them. Statutes are not presumed to be superfluous. *United States v. Blasius*, 397 F.2d 203, 207 (2d Cir. 1968), *cert. denied*, 393 U.S. 1008 (1969).

"[S]uccessive drafts or amendments" may be compared to ascertain legislative intent. *Wright v. Vinton Branch, etc.*, 300 U.S. 440, 463 n.8 (1937).

4. The Legislative History Further Shows That The Exemption Is Not Limited To Supreme Court Justices But Also Includes Other Persons Who Exercise Judicial Power.

Although the Title VII legislative history mentioned Supreme Court Justices, it was not limited to them.

Senator Ervin, in referring to the original bill before the exemption was added, asked a number of questions, including:

> Mr. President, as was pointed out in the last letter I read, there is nothing in the bill that clarifies who is a State employee or an employee of a local political subdivision of a State. Does it include the Governor of the State? Does it include the supreme court justices of the State? Does it include the members of the State legislature? Does it include all those elected sheriffs in the various counties? Does it include the various clerks of the court *and other men who exercise executive and judicial power?*

118 Cong. Rec. 1811 (emphasis added).

Sen. Ervin, furthermore, discussed "State judges, whether they are elected *or* appointed to office" and even "clerks of superior courts of counties and their assistants." *Id.* at 1677 (emphasis added). He also cited "persons who exercise the legislative, executive and judicial powers of the States *and* political subdivisions of States." *Id.* at 1838 (emphasis added). This would include local judges of only limited jurisdiction. *See also id.* at 1677, referring to appointments of those exercising judicial powers by political subdivisions of States.

It would be aberrant to exempt a municipal judge of only restricted authority or a staff member who merely advises as to constitutional or legal powers — while not exempting the constitutional court of original and general jurisdiction

which actually decides those powers. " '[W]e cannot attribute to Congress the intention to . . . open the door to such obvious incongruities . . . .' " *Metropolitan Edison v. People vs. Nuclear Energy*, 460 U.S. 766, 776 (1983). Congress presumably did not intend its laws to be absurd. *See United States v. Turkette*, 452 U.S. 576, 580 (1981); 2A Sutherland, *supra* p. 14.

As the Court of Appeals stated:

> We believe it is highly unlikely that Congress intended this result, [exempting elected judges but not appointed ones] and the implausibility of the total exclusion of the appointed members of the state judiciary from any exemption under the ADEA, despite the total exemption of elected judges from the coverage of the Act, weighs heavily against such a narrow reading of the policymaking level exception. *See EEOC v. Massachusetts*, 680 F. Supp. at 460-61.

898 F.2d at 602.

C. JUDGES ARE AT THE JUDICIAL POLICYMAKING LEVEL OF GOVERNMENT.

As the First Circuit recognized:

> This judicial type of policymaking is unlike that done in the executive and legislative branches of government. It nevertheless requires the same kind of decisionmaking, and the same kind of forward thinking that is required of "appointees on the policymaking level" in those other two branches of government. And it certainly concerns state government to a similar degree.

858 F.2d at 55.

Policy includes "the art or science of government: the conduct of public affairs." *Webster's Third New International Dictionary* 1754 (1961). It also includes "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in

the light of given conditions to guide and usu. determine present and future decisions." *Id.*

That is exactly what courts of all levels do. They formulate judicial policy. "Many decisions of this Court . . . have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), that '[i]t is emphatically the province and duty of the judicial department to say what the law is.' " *United States v. Nixon*, 418 U.S. 683, 703 (1974).

Furthermore, the three branches of government are not entirely separate and distinct. There is a certain degree of overlapping responsibility, "a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.' " *Mistretta v. United States*, ___ U.S. ___, 109 S.Ct. 647 at 659 (1989).

The judiciary has inherent power to develop new equitable remedies for new problems, and "while it must adhere to the law, the Court can pursue remedies that it believes will best effectuate existing public policy." Judge John M. Walker, Jr., *Decisionmaking in Government: A Personal Perspective*, 36 Fed. Bar J. 333, 334 (1989). "Determining a sentence that will serve the ends of justice and meet community needs is a matter of pure judgment. No staff of experts could possibly calculate a 'correct' answer in such a situation." *Id.* at 335.

It has been said that "[o]ur entire body of what is described as the 'common law' is the resultant of innumerable court decisions, based upon the judicial notions of sound social policy and human welfare." 6A A. Corbin, *Corbin on Contracts* § 1375 at 18 (1962). *See generally, id.* at 10-19. Holmes stated that:

> The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and

> at bottom the result of more or less definitely understood views of *public policy;* most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

O.W. Holmes, Jr., *The Common Law* 35-36 (1881). (Emphasis added.) *See also id.* at 30, 181, 198.

It is simply too late in the day to ignore the unique role of judicial policy in our country's history.

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.

Law Is Justice, Notable Opinions of Mr. Justice Cardozo 428 (A. Sainer ed. 1938), quoting B. Cardozo, *The Nature of the Judicial Process* 112 (1922); *see generally, Law Is Justice, supra,* 427-429. "In the case at bar, also, the logic of the words should yield to the logic of realities." *The Social and Economic Views of Mr. Justice Brandeis* 333 (A. Lief ed. 1930), quoting dissent in *DiSanto v. Pennsylvania,* 273 U.S. 34, 43 (1927).

The enforcement of restrictive social covenants "is contrary to the public policy of the United States . . . ." *Hurd v. Hodge,* 334 U.S. 24, 34, 35 (1948). " '[A]ny relief can be fashioned in the light of well-known principles of equity.' " *Reynolds v. Sims,* 377 U.S. 533, 585 (1964). "The public policy to be applied is the public policy of the present time. The changing conditions of life [determine] . . . whether the public interest requires that a restrictive stipulation shall be deemed void as against public policy." *Samuel Stores, Inc. v. Abrams,* 94 Conn. 248, 252 (1919). The grounds for illegality of an agreement include "the often vague dictates of

public policy." *May Dept. Stores Co. v. First Hartford Corp.,* 435 F.Supp. 849, 852 (D. Conn. 1977).

The practice of the U.S. Supreme Court itself is "one of judicial policy." *Metropolitan Water Dist. v. Adams,* 19 Cal.2d 463, 122 P.2d 257, 263 (1942).

Judicial policy takes many forms. For example: "We recognize that stare decisis embodies an important social policy . . . . But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . ." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940).

The role of judicial policy is even greater with state courts.

> Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, *unlike their state counterparts,* are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.

Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981) (emphasis added) (citation omitted).

"Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 312 (1981).

As Justice Cardozo stated: "The choice for any state [as to the effect of precedent] may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Great Northern Railway v. Sunburst Co.,* 287 U.S. 358, 365 (1932).

The Second Circuit itself recognized that there are times when courts "must determine what legal principles apply when there is a lacuna in the law or determine how seemingly conflicting legal principles are to be reconciled." *Vermont,* 904 F.2d at 800.

These considerations apply to tribunals such as the Connecticut Superior Court, which is a constitutional court of general jurisdiction. *See Adams v. Rubinow*, 157 Conn. 150, 155-56 (1968).

First, the Superior Court has inherent rule-making power, irrespective of legislation. 1 Conn. Pract. Bk., §§ 1, 7; *Heilberger v. Clark*, 148 Conn. 177, 185 (1961).

In referring to a case involving judicial rule-making power, this Court stated that "having the power to make decisions and to set policy is what gives the State its sovereign nature." *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 761 (1982), citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977).

The latter decision recognized that "the rules are subject to pointed re-examination by the *policymaker* — the Arizona Supreme Court . . ." *Bates*, 433 U.S. at 362. (Emphasis added.)

In Connecticut, moreover, the rules are issued by the Superior Court, not simply by Supreme Court Justices. 1 Conn. Pract. Bk., § 7.

Wholly apart from rule-making, furthermore, "trial courts have decided difficult constitutional issues with initiative and courage rather than reserving them to the supreme court . . ." Judge Robert Satter and S. Geballe, *Litigation Under the Connecticut Constitution — Developing a Sound Jurisprudence*, 15 Conn. L.R. 57, 59 (1982). "Vigor and creativity in the development of the law is [shown] at the trial court level . . ." *Id.* at 66. These decisions can significantly influence Supreme Court opinions and provide that Court the benefit of the Superior Court's reasoning. *See id.* at 81. The coauthor, Judge Satter, is the plaintiff in the Connecticut ADEA case.

In fact, for the Superior Court *not* to consider the constitutionality of a statute is error. *Commissioner of Welfare v. Rynecki*, 37 Conn. Sup. 560, 561-62 (Super. Ct. App. Sess. 1981). As a court of general jurisdiction, it must do so. *See also State Management Assn. of Connecticut v. O'Neill*, 40 Conn. Sup. 381, 384-85 (1986), *aff'd*, 204 Conn. 746 (1987).

Although a Superior Court decision may be reversed on appeal, the same is also true for that of a cabinet member, whose action can be overturned with far less formality, yet who is exempt from the ADEA. *See* 904 F.2d at 800.

Furthermore, appellate review in general must be seen as a rather weak and indirect instrument of control. Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442, 1445 (1983).

In summary, the Superior Court has a supreme jurisdiction original and appellate over the trial of all causes not committed to the jurisdiction of inferior courts. *Styles v. Tyler*, 64 Conn. 432, 450 (1894). Judge [later Chief Justice] John P. Cotter stated:

> Since 1711, the Superior Court has been the highest court of original trial jurisdiction. To me, it is the foundation of the administration, the profession and practice of the law; it is the bulwark of our law and, throughout the country, the highest court of original jurisdiction is the cornerstone of the judicial department *and the most important court in a state* . . .

Hon. J.P. Cotter, *The Constitutional Court*, 34 Conn. Bar J. 91, 95 (1960) (emphasis added).

> Clearly, each judge, as a separate and independent judicial officer, is at the very top of his particular "policymaking" chain of command, responding, if we can call it that, only to a higher appellate court.

E.E.O.C. v. Commonwealth of Mass., 858 F.2d at 56.

II. PETITIONERS CANNOT PROVE THAT THE JUDICIAL TENURE PROVISION LACKS A RATIONAL BASIS AND DENIES EQUAL PROTECTION.

Petitioners acknowledge that age is not a suspect class. Pet. Brief, p. 28.

The Second Circuit itself has held that maximum age limitations for state inferior court judges are reasonable. *Rubino v. Ghezzi*, 512 F.2d 431, 433 (2d Cir. 1975) (per curiam),

cert. denied, 423 U.S. 891 (1975). As the New York Court of Appeals ruled:

> The mandatory retirement age limitation for State Judges is rationally related to the promotion of any or all of the following State interests: (1) advancement of general considerations of judicial efficiency (*Rubino v. Ghezzi*, 2nd Cir., 512 F.2d 431, 433, *cert. den.* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122); (2) motivation and encouragement of qualified, younger attorneys with judicial aspirations, by this orderly process of attrition (*Rubino v. Ghezzi, supra; Vance v. Bradley*, 440 U.S. 93, 100, 99 S.Ct. 939, 944, 59 L.Ed. 2d 171, *supra*); (3) elimination of the unpleasantness and embarrassment of selectively removing aged and disabled Judges (*Malmed v. Thornburgh*, 3rd Cir., 621 F.2d 565, 572, *cert. den.* 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219); (4) prevention of harm by a few disabled Judges which more than offsets loss of Judges who retain full powers past age 70 (*Malmed v. Thornburgh, supra*); (5) elimination of the administrative burden of testing each Judge attaining the age of 70 to assess competency; (6) avoidance of the economic burden of testing and removing incapable Judges; and (7) the fixing of a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber Judges in the system (*O'Neill v. Baine*, 568 S.W. 2d 761 [Mo]). The challenged provisions mandating retirement at the end of the year in which age 70 is reached manifestly have a rational basis.

Maresca et al. v. Cuomo, et al., 64 N.Y.2d 242, 475 N.E. 2d 95, 99 (1984), *appeal dismissed*, 474 U.S. 802 (1985).

In fact, there are maximum age limits of 64 for appointment *and* 70 for retention for Chief Judges of both the U.S. Courts of Appeal and District Courts. 28 U.S.C.A. §§ 45(a)(1)(A) and 3(C) and § 136(a)(1)(A) and 3(C).

In the Connecticut case, furthermore, the Chief Court Administrator testified as to his experience in dealing with infirmities of judges:

> With respect to judges, and by definition these are individuals under 70, I have had only rare occasions to be concerned about their infirmities — and I'm not speaking about physical infirmities at this point — and there are approximate 160 judges of the Superior Court, including senior judges, there are approximately 39 working referees [i.e., retired judges over age 70] and I have had more occasion to have to intervene with respect to those individuals than the other category. App., 24A.

III. FINAL CONSIDERATIONS CONCERNING STATE SELF-GOVERNMENT.

Traditional and essential state interests are not to be undercut by mere Congressional vagueness. *Garcia* presumes that the inherent restraints of the national political process "ensures that laws that unduly burden the States will not be promulgated." 469 U.S. at 556. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, *supra*, § 6-25, at 480 (emphasis by Tribe).

It follows from *Garcia* and *Baker* that any Congressional decision impairing state self-government must be made deliberately and explicitly by Congress itself. It is not to be made by an administrative agency, however well-intentioned, to which the Court then defers. That is not the work of the national *political* process in which the states participate. *See Garcia*, 469 U.S. at 556-57.

This case goes to the heart of state self-government. This includes internal state activities and institutional organization which should be safeguarded. *See* Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 105 (1985). "[E]ssentially internal state activities" should be protected. *Id.* "Such

internal matters would include the organization of state and local governments . . . ." *Id.* at 105.

> Even prior to *National League of Cities*, there was authority that the Court could step in to prevent the destruction of states. Opponents and supporters of *National League of Cities* alike have endorsed this view of the judicial role in protecting the states. *Id.* at 112.

"[T]he real business of preserving federalism" is "protecting the structure of state government from federal intrusion." L. Tribe, *supra*, § 5-22, at 396. The "tacit postulates" of federalism ensure that the existence of states is a meaningful one. *Id.* at 397. The present issue may not involve a frontal attack on that existence. It does, however, concern "a gradual chipping away at state authority" which can be insidious. *See* Field, *supra*, 99 Harv. L.R. at 112 and *id.* at n.145.

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.

L. Tribe, *supra*, § 5-20, at 381.

The most fundamental threats to federalism come from national edicts which "*restructure* the basic institutional design of the system a state's people choose for governing themselves." L. Tribe, *supra*, § 5-23, at 397.

The policies of "Our Federalism," which include a dual judicial system, should not be eroded. *See Younger v. Harris*, 401 U.S. 37, 41, 44 (1971); *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Engineers*, 398 U.S. 281, 285-86 (1970). "It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Younger*, 401 U.S. at 44-45 (Black, J.).

CONCLUSION

IT IS THEREFORE respectfully submitted that the decision below should be affirmed.

Respectfully submitted.

STATE OF CONNECTICUT,
AMICUS CURIAE IN SUPPORT
OF RESPONDENTS

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No. 90-50

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR., AND
ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE
STATE OF MISSOURI,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX OF AMICUS CURIAE STATE OF CONNECTICUT

(EXCERPTS FROM TRANSCRIPT OF HEARING NOVEMBER 8, 1990)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT SATTER and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Plaintiffs,	:	
vs.	:	CIVIL H-89-525 (JAC)
THE CONNECTICUT JUDICIAL DEPARTMENT, ELLEN PETERS and AARON MENT,	:	
Defendants.	:	
		NOVEMBER 8, 1990
		NEW HAVEN, CONNECTICUT

B E F O R E :

HON. JOSE A. CABRANES, U.S.D.J.

A p p e a r a n c e s :

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Paul Collard
Official Court Reporter.

THE COURT: We have a hearing this afternoon in Robert Satter and the Equal Employment Opportunity Commission vs. The Connecticut Judicial Department, Ellen Peters, in her official capacity, and Aaron Ment, in his official capacity, Civil Action Number H-89-525(JAC).

I note also that fourteen Connecticut State Trial Referees have been granted permission to appear as amici curiae.

* * * *

Let me briefly state what I believe to be the procedural posture of this case:

On August 15, 1989 the court entered a temporary restraining order enjoining the defendants from removing the plaintiff from his office as a senior judge of the Connecticut Superior Court and from depriving him of his powers and duties as a senior judge at the time that he reaches 70 years of age.

Judge Satter turned 70 four days later — that is, on August 19, 1989.

On September 21, 1989, I granted a motion to stay these proceedings and to extend the temporary restraining order until further order of the court pending the Court of Appeals' decision in a case called Equal Employment Opportunity Commission versus State of Vermont. That case raised similar or arguably similar issues concerning the applicability of the Age Discrimination in Employment Act of 1967 to state court judges required by their state constitution to retire when they reach the age of 70.

The decision in State of Vermont came down on May 21, 1990, and is now published at 904 F.2d 794.

The Court of Appeals held that Vermont's appointed judges were employees within the meaning of the Age Discrimination in Employment Act and were therefore entitled to the Act's protection, even against the clear language of the Vermont state constitution.

At a status conference on August 24, 1990, we agreed to let stand the temporary restraining order until we could schedule a hearing on the permanent injunction sought by the plaintiff in his complaint.

This is, as I understand it, the purpose of the hearing today.

* * * *

MR. GOULD: Then I believe the plaintiffs have one witness.

THE COURT: That's fine.

* * * *

Fine. Let's hear, then, from the first witness.

MR. GOULD: We call the plaintiff, Robert Satter.

ROBERT SATTER, called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Please be seated.

Would you please state your name and spell your last name?

THE WITNESS: Robert Satter, S-a-t-t-e-r.

THE CLERK: And your address, please?

THE WITNESS: 339 Stanley Drive, Glastonbury, Connecticut.

DIRECT EXAMINATION

BY MR. GOULD:

Q Judge Satter, could you tell us what position you presently hold with the State of Connecticut or the Connecticut Judicial Department?

A Senior Judge of Superior Court.

Q And could you briefly describe whether in holding that position you have any administrative duties?

A No.

Q You have none?

A I have none. I have one — I don't think it's administrative duty; I'm chairman of a committee that oversees the printing of trial court opinions, but that's all.

THE COURT: Hold on one second.

Judge Satter, could you adjust the microphone and perhaps your push chair right in and speak into the microphone?

Thank you.

Go ahead, Mr. Gould.

MR. GOULD: I really have nothing further, your Honor. I believe everything else is contained in our Stipulations of Facts and sets forth our case, and I merely want it to end at that.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. SCHAEFER:

Q Judge Satter, I didn't — You'll excuse me, but I didn't quite hear the answer to the last question. And could you just briefly tell us what you do in chairing that committee?

A Well, I'm chairman of a committee that oversees the printing of trial court opinions, publishing of trial court opinions. In that regard, trial judges send me opinions, which I have a committee of state referees, and I ask them to peer review the committees and send their evaluations directly to the reporter, the law reporter who publishes them when they can be published.

Q And your committee deals with opinions of the Superior Court, am I correct?

A Yes.

Q And your committee decides which of those opinions should be published?

A Yes. I send them — it isn't really a committee. I send it out to state trial referees and ask them to evaluate them. If they approve them, if the trial referee approves them, his evaluation is sent to the reporter, and when there's space they're published in the supplement.

Q -And the purpose of the committee is to decide which of these opinions should be published, is that correct?

A Yes.

MR. SCHAEFER: Thank you.

No further questions, your Honor.

MR. GOULD: I have nothing further, your Honor.

THE COURT: Are there any questions that counsel would wish to put to Judge Satter regarding the issue raised by amici curiae regarding the assertedly unique character of the judicial system of Connecticut?

MS. EMMETT: Your Honor.

THE COURT: Perhaps Ms. Emmett could do that.

MS. EMMETT: Thank you.

THE COURT: And we'll permit her to do that, absent objection.

MS. EMMETT: Thank you, your Honor.

I think most of the arguments in our memorandum are covered by the Connecticut statutes, constitution, case law and stipulation which has been entered here, but there is one thing which I would like to ask Judge Satter, if I might, and that is:

CROSS-EXAMINATION

BY MS. EMMETT:

Q Judge Satter, it's my understanding that you have retired from the Superior Court bench at this time, is that right?

A I'm a senior judge. Yes. Somebody took my place, yes.

Q Right. But in the summer of 1988 you did retire voluntarily from the bench, is that right?

A Yes.

Q All right. And there's nothing further that you need to do at this point in order to become, if you will, more retired, is there?

MR. GOULD: I'd have to object to that question, your Honor.

MS. EMMETT: It may not be a comprehensible question. Perhaps I should rephrase it.

Q But what I'm driving at is that there's no further official action that you need to take at this point to cease working for the Judicial Department, is there?

A I think it's the other way around. I can exercise the right to work. As a senior judge, I have the right to work as a Superior Court judge.

Q That's correct. I don't disagree with you.

But my question is something else. That you are retired at this point, but you do have the opportunity to work, is that right?

THE COURT: You mean as a senior judge?

MS. EMMETT: As a senior judge, yes.

A I work as a senior judge.

BY MS. EMMETT:

Q All right. I guess I may not be able to ask this question to get an answer that I would like to get, but my point is

that there is no more retired status than you currently have available in the Judicial Department, is that right?

A I don't know what that means. I mean —

THE COURT: Can I ask a question, and it may reflect a certain ignorance on my part, so bear with me.

Judge Satter, why, in your view, would it be preferable to be a senior judge indefinitely, than to become a trial referee?

THE WITNESS: Well, the powers of a senior judge are equivalent to that or equal to that of a Superior Court judge. There's no limitation on the powers of a senior judge, subject only to his willingness to undertake them.

A state trial referee has certain limited powers. He can't try a civil jury case without the permission of the attorneys, he can't hear criminal matters, and, I don't know, the statute sets forth the other distinctions.

MS. EMMETT: I do not have any further questions. Thank you.

THE COURT: Any other questions, Mr. Gould?

MR. GOULD: Nothing further, your Honor. I think it's all been out.

THE COURT: Counsel for the EEOC?

MR. GRAZIANO: No questions, your Honor.

THE COURT: Mr. Schaefer, any questions for Judge Satter before we excuse him?

MR. SCHAEFER: Yes. Just one second, if the Court would just bear with me?

THE COURT: Yes.

(Pause)

BY MR. SCHAEFER:

Q Excuse me, Judge Satter. You said that, and please correct me if I'm wrong, that you, as a state trial referee, could not hear a civil jury case without the consent of the parties and that's one of the limitations, is that correct?

A Yes.

Q All right. But a senior judge, or for that matter a regular Superior Court judge, couldn't hear a civil jury case at all if he was assigned to another division such as Criminal, is that correct?

A Sure, wherever I'm assigned I take that case.

Q Right. But whether one could hear a civil jury case with or without the consent of the parties requires one to be assigned to hear civil jury cases in the first place, isn't it?

A Yes.

MR. SCHAEFER: Thank you.

THE COURT: Any other questions? Ms. Emmett?

MS. EMMETT: Your Honor, I believe that Mr. Schaefer just asked a question that I was going to ask. Thank you.

THE COURT: Anyone else?

Absent objection or further comment, Judge Satter may step down.

(Witness excused).

MR. GOULD: Thank you, your Honor.

THE COURT: Any other witnesses for the plaintiffs?

MR. GOULD: No. In fact, your Honor, we will rest under the assumption that the agreements that we made in the attorneys' lounge before we came in today on the stipulations of fact are the ones that are going to be entered in the record and signed by all parties.

* * * *

MR. GOULD: The plaintiffs have rested our case in chief. We have no testimony further.

THE COURT: Mr. Schaefer?

MR. SCHAEFER: Yes, your Honor.

We would like to call the Chief Court Administrator to go into some of the matters that have been recognized in other decisions that we felt were not adequately dealt with or perhaps not fully appreciated in the Second Circuit's decision.

So with the permission of the Court, I'd like to call Judge Ment, please.

A A R O N M E N T, called as a witness, being first duly sworn, was examined, and testified as follows:

THE CLERK: Please be seated.

THE WITNESS: Thank you.

THE CLERK: Would you please state your name and spell your last name?

THE WITNESS: Aaron, A-a-r-o-n, Ment, M-e-n-t.

THE CLERK: And your address, please?

THE WITNESS: 15 Stoneleigh Road, Fairfield, Connecticut 06432.

DIRECT EXAMINATION

BY MR. SCHAEFER:

Q Judge Ment, you're the Chief Court Administrator of the State of Connecticut?

A Yes.

Q And could you just briefly tell us what you do as Chief Court Administrator?

A My responsibilities are to oversee the day-to-day administration of the Department, including the assignment of judges and the general administration of the Judicial Department.

Q And when were you appointed?

A 1984.

Q And you were appointed by the Chief Justice at that time?

A By Chief Justice Speziale. I serve at the pleasure of the Chief Justice.

I was later re-appointed by Chief Justice Ellen A. Peters.

Q And could you tell us just a little bit about your prior government service?

A I began service in the legislature as an aide to then Speaker Testo, followed by being counsel to Speaker Ratchford for two terms, counsel to the Minority Leader Carl Ajello for one term, counsel to Governor Grasso for two years, and then appointed to the bench.

Q And which courts did you serve on prior to becoming Chief Court Administrator?

A Court of Common Pleas and Superior Court.

Q And the approximate time periods?

A Common Pleas was from 1976 to 1978.

1978 to 1984 on the bench of the Superior Court.

Since 1984 continuing as a Superior Court Judge, but serving as Chief Court Administrator.

Q And between those two courts could you just tell us generally what kind of cases you handle?

A Principally, I sat on criminal cases, but I sat on all cases — excluding Housing.

Q And you're familiar with the demands those cases make on a judge?

A Yes.

Q Now, as Chief Court Administrator do you deal with other Superior Court judges?

A I have certain statutory responsibilities: assignments, admonishments, I also have all other duties corresponding to that of any administrator.

In addition, I am the principal individual who is involved in the judicial performance evaluation, which is an evaluating procedure for all Superior Court judges.

Q And do you have any dealings with the Judicial Review Council?

A I deal with the Judicial Review Council relatively often.

Q Okay. And I know this is set forth in the statutes and we can refer to this in the brief, and I'm sure his Honor is generally aware of it, but just briefly could you tell us what that agency does?

A The Judicial Review Council is a council that is a disciplinary council, it's an executive branch of government council that disciplines judges when necessary, and also is the body that would determine medical retirements.

Q Now, do you also deal with state referees?

A Yes.

Q And could you please tell us about that also?

A My principal responsibility with respect to referees is in the re-designation of referees. Referees must be designated by the Chief Justice each year as a trial referee. Therefore, there is a procedure which she has put in place which places me responsible for the gathering of information each year as to each referee.

Q And, generally, do you know what state trial referees do?

A Yes.

Q And what do they do?

A State referees generally handle non-jury matters that are not of a criminal nature. They do handle jury matters, of course, with consent of counsel.

THE COURT: Can I just inquire, Judge Ment?

THE WITNESS: Yes, Judge.

THE COURT: Do I understand, therefore, that if one were a senior judge, one would not have to be reviewed by your office and the office of the Chief Justice, is that right?

THE WITNESS: No, that's not correct, Judge Cabranes.

Senior judges sit with a less formal review, but they sit only if assigned by me. In a way that the Chief Justice designates trial referees, I have some responsibility with respect to senior judges.

Senior judges really sit by agreement. We agree, the senior judge and I agree as to assignment. If under the statute I feel a judge cannot sit, I would not assign her or him.

THE COURT: Go ahead.

MR. SCHAEFER: Thank you.

BY MR. SCHAEFER:

Q And I just wanted to come back to senior judges. You, of course, were here when Judge Satter testified. Is it fair to say a senior judge can perform administrative duties?

A Can and does.

Q All right. Now I want to ask about the state trial referees. Can they perform any administrative duties?

A Yes.

Q Do they?

A Yes.

Q Could you just give us a few examples?

A Well Judge Sponzo, who's in the courtroom, performs administrative duties daily.

THE COURT: Today?

THE WITNESS: Every day. From 1984 to the present. Occasionally misses a day, but not often.

BY MR. SCHAEFER:

Q And what type of duties are those?

A Judge Sponzo was my principal agent with respect to the judicial performance evaluation committee.

In addition, however, he performs a full range of duties and is also principally responsible for coordinating the meetings that we have on a quarterly basis with the Department of Public Works and others concerning facilities, construction, and maintenance of facilities.

Q And are there any other examples you can give us on administrative duties?

A For other judges, other referees?

Q State trial referees, right?

A We have a pre-trial or pre-argument settlement plan that is in effect for the appellate process. Senior judges and referees administer that program, as well as being the individual who, in fact, tries to resolve these issues.

Senior Associate Justice Santaniello is the principal coordinator. Referee Bieluch is another individual involved in the program.

Q And I just wanted to come back to this process of certification, I think you've adequately explained it, but I just want to make sure we have it in the record.

Could you just briefly tell us how the process of certification —

A Yes. In May of each year my office sends a form to the referee asking whether she or he wishes to be redesignated. If the response is yes, then the form is forwarded to the administrative judge for each of our twelve judicial districts.

That judge has to indicate to me whether or not that judge has sat, whether or not that judge is available for sitting, whether or not that judge — and when I say "judge" I really am talking about referees at this point — whether that referee is able to sit, with a list of questions. If the answer to any of those questions is no, the administrative judge is directed by me to discuss the matter with the referee. If the answer is yes, obviously it comes to me, I just certify it for the Chief Justice, and it goes on to her.

If there is a question after the discussion between the referee and the administrative judge, if the administrative judge still doesn't feel that she or he can certify that individual, I speak to the referee and make a final decision.

Q I want to ask you something about your contacts and experience with the state legislature beyond what you've already testified to prior to appointment.

Do you submit a biennial report to the legislature concerning recommendations as to court operations?

A Yes.

Q And do you have any other contacts with the legislature as Chief Court Administrator?

A Yes. A major portion of my responsibility is to deal with the legislature.

When they are in session, I perhaps will spend one-quarter to one-third of my time dealing with the legislature every day.

When they're not in session, it's not as demanding, but I still believe it would be five to ten percent of my time year-round.

Q And as Chief Court Administrator, have you had any experience in determining legislative reactions to, well, Judicial Department issues?

A Yes.

Q And could you tell us about that, please?

A The Department annually submits between 20 and 30 legislative proposals. When those proposals are submitted, I then go before the General Assembly, principally the Judiciary Committee, and testify on those bills, respond to questions, and have a series of one-on-one conversations with the legislators relative to those proposals.

Additionally, I am asked to comment upon any proposed statute that would impact the Judicial Department. In order to perform those tasks, I spend a great deal of time discussing matters with legislators. There is no hesitation on their part to give me their opinion about those questions, or anything else.

Q You may have testified to this, and excuse me if you have, but about what percent of your time is spent in meeting with the legislature?

A During the session, 25 percent, perhaps more.

THE COURT: Mr. Schaefer, I'm just wondering, what is the probative value of this particular testimony?

MR. SCHAEFER: I'm going into what we anticipate the legislative reaction would be to striking down the constitutional provision.

THE COURT: I see. Yes.

MR. SCHAEFER: Then I have to, I think, establish a foundation that the Judge is in contact with that.

THE COURT: That's fine. I just wanted to know what it is.

MR. GOULD: Your Honor, I'm going to be objecting to too much inquiry into this.

So far I don't see why he can't testify, but I honestly don't see if we're going to hear testimony about what the legislators may or may not do in response to this case, I don't think that's relevant. I think it's speculation; it can only be founded on hearsay.

THE COURT: Well, we'll find out. We'll take it for what it may be worth.

BY MR. SCHAEFER:

Q Have you had — in general, have you had discussions with the legislature concerning the effects of judicial invalidation of state statutes?

A Yes.

Q And have you had any such discussions concerning this case?

A Yes.

Q And without going into them and telling us what they were at this point, can you tell us, have those discussions been with any members of the Judiciary Committee?

A Yes.

Q Legislative leadership?

A Yes.

Q Now, based on your experience and your knowledge, and your work with the General Assembly, what effect, if any, do you anticipate there would be on the State Judicial Department if the provision concerning mandatory retirement of judges at age 70 were to be struck down?

MR. GOULD: Your Honor, I object to the question as calling for speculation and based on opinion that I don't think he's qualified to anticipate what could happen as a result of this case.

THE COURT: May I have the court reporter read the question back.

(Question Read Back).

MR. SCHAEFER: Your Honor, first, we're doing this one step at a time. I think we qualified him as an expert through his government experience in three branches of government — through his general experience having served as an aide in the General Assembly, more specifically, his contacts with the General Assembly as Chief Court Adminis-

trator, one of his functions being to ascertain legislative reaction to various Judicial Department issues, and the testimony that he has discussed this case with members of the legislature — specifically, the Judiciary, or including, I should say, the Judiciary Committee and the leadership.

And beyond that, I think it's the weight of the evidence. It is opinion perhaps, but I believe he's qualified as an expert opinion.

THE COURT: We'll take it for what —

MR. GOULD: I also have an objection for the foundation if it's based on discussions with parties who aren't here and it would be based on only hearsay information.

THE COURT: The objection is overruled. We'll take it for what it may be worth.

MR. SCHAEFER: I think the Federal Rules well establish that, your Honor.

THE COURT: Go ahead.

BY MR. SCHAEFER:

Q Would you like the question read back or do you understand my question?

A I think I can still remember the question, Mr. Schaefer.

Q Yes. Thank you.

A There are several probable responses by the General Assembly.

The first I believe would be for them to re-examine the constitutional provision for eight year terms. It has been suggested several times that they feel that if, in fact, the

present constitutional basis for the eight year term is invalid, they would review that with the idea of shortening the term to allow them to have a more frequent review of the judges.

Q Now, why would they want to shorten the term?

A They would want to shorten the term because they would feel that an eight year term would be too long in view of what they consider to be the higher degree of likelihood of infirmity at later ages.

Q Now, before I get back to the legislature, have you had any experience as Chief Court Administrator with that issue which you just testified to?

A Well, in the process that I explained earlier with respect to re-designation, yes, there have been instances where judges were not re-designated because of infirmity.

Q And have you had any experience in whether or not this is a greater problem at more advancing years of age than it is at earlier years of age?

MR. GOULD: That can be answered yes or no, your Honor. If he goes further, I have to object.

A Yes.

BY MR. SCHAEFER:

Q Could you tell us what your experience has been in that?

THE COURT: You have an objection, Mr. Gould?

MR. GOULD: Well, I think there should be some foundation for the basis of this. I mean, is he doing it from — has he heard of instances, has he been there, has he talked to people?

THE COURT: Why don't you try to lay a greater foundation, Mr. Schaefer.

MR. GRAZIANO: Your Honor, —

MR. SCHAEFER: Well, your Honor, there is testimony —

THE COURT: Hold on a second.

Sir?

MR. GRAZIANO: Your Honor, I think the Government would object further. The fact that he may have had some experience, even very specific and maybe very firsthand, I'm not quite sure that that's relevant enough in the scheme of things to establish some kind of a pattern that older employees across the board developed greater infirmity. I think that that's an area of expertise that, with all due respect, I don't believe Judge Ment is qualified to answer.

MR. SCHAEFER: Well, I'm not just asking his own experience concerning the Judicial Department, your Honor.

THE COURT: The objection is overruled. Go ahead. But do lay a foundation in accordance with Mr. Gould's inquiry.

MR. SCHAEFER: Yes, your Honor.

BY MR. SCHAEFER:

Q Without telling us at this point the results of your experience, could you tell us what your experience has been, that is, how you know this?

A One of the responsibilities of the office is to, with respect to judges, is to admonish judges or to relieve them of responsibility when they have — when there is a belief,

a reasonable belief that they may, in fact, be subject to drug abuse, other infirmities associated with drug and/or alcohol, and also with respect to mental infirmities.

So through the judicial performance evaluation committee, and through observation, and through the administrative judges, I am informed when there is a possibility that such infirmity exists.

With respect to referees, obviously through the designation process I am informed annually for each referee as to his or her status.

Q And based on the information that has come to your attention in your work as Chief Court Administrator, could you tell us what the results of your experience has been on this issue?

A With respect to judges —

MR. GOULD: Excuse me, your Honor.

Which issue are you referring to?

MR. SCHAEFER: Well, the issue we are dealing with — and that is the greater likelihood of infirmities at more advancing years of age than at earlier years of age, for which I have to lay the foundation.

MR. GOULD: Are you asking him whether he's seen greater infirmities for people who are more than a certain age?

MR. SCHAEFER: The question is as stated in the record.

THE COURT: The objection is overruled. Let's let him proceed.

Mr. Schaefer, go ahead.

MR. SCHAEFER: Thank you, your Honor.

A With respect to judges, and by definition these are individuals under 70, I have had only rare occasions to be concerned about their infirmities — and I'm not speaking about physical infirmities at this point — and there are approximate 160 judges of the Superior Court, including senior judges, there are approximately 39 working referees, and I have had more occasion to have to intervene with respect to those individuals than the other category.

BY MR. SCHAEFER:

Q Now, if the legislature were to shorten, through the constitutional process, the term from eight years to a lesser term — I don't want to put words in your mouth, I believe you mentioned four years, am I correct on that?

A That was the figure that's been mentioned to me and one I repeated to the Court earlier, yes.

Q All right. What effect would that have on judicial independence?

MR. GOULD: Objection, your Honor, for reasons stated before.

THE COURT: Overruled. Go ahead.

A The shorter the term, the more difficult the issue of judicial independence becomes.

We already have a situation where many judges are concerned, especially in the two or three years prior to their reappointment. Several judges recently were not reappointed by the General Assembly, and the difficulty of balancing independence versus accountability is one that we struggle with every day.

The shorter the term, the more weight there is on the accountability side, the less weight on the independence side, and I have great concern that the judicial independence in Connecticut would be lessened.

BY MR. SCHAEFER:

Q Why can't the legislature rely on some of these other methods to deal with these problems, such as the Judicial Review Council, and the impeachment process, and the removal by address of the General Assembly, two-thirds, I believe?

A Those processes are deliberately made cumbersome and difficult to use, as they should be.

When those methods are used, and they've been used infrequently to my knowledge, the entire bench suffers. And I think the legislature realizes this and is reluctant to use them and reluctant to rely upon them.

Q Now, would striking down the mandatory age retirement provision of age 70, would this have any other effects on Judicial Department operations other than what you mentioned?

MR. GOULD: Objection, your Honor, for the reasons stated before.

THE COURT: Overruled. Go ahead.

A We would be limited in the number of judges or in the number of individuals that we would have available to us to perform the necessary functions of the court.

For example, it would be less likely that we would have as many referees as we now have. And the referee program as it now is constituted is really a two-for-one.

We have the use of the referee when that referee cares to work, which in 39 instances is fairly often during the year. And we also receive a replacement judge. We would not have that under the other theory.

Q Now, would this have any — apart from that, would this have any effect on the issue of judicial turnover?

A One of the things that we're looking for is to make the bench more representative of the society in which we live. There would be less turnover. There would be less turnover, less opportunity for women and minorities to enter the system.

Q Just moving along here, looking at some of these other alternatives, why couldn't we just provide in Connecticut for our state courts life tenure for judges and then have their actual assignments depend on their ability to handle cases?

A The General Assembly will not consider such a possibility, in my opinion, during any of our lifetimes.

Q And could you —

A Two years ago the Chief Justice made a suggestion to that effect in her address to the General Assembly and to the Judiciary. I'm still reminded of that address today. Not literally today, obviously, but within weeks. It's not going to happen.

Q And the legislative concern, without going into any detail, is the legislative concern the issue of the balance between accountability and independence?

A The legislature, in my opinion, Mr. Schaefer, simply is not ready to provide Connecticut judges with that security.

MR. SCHAEFER: I think we've covered our key questions, your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. GOULD:

Q Judge Ment, I think you mentioned that criminal matters may be assigned to senior judges, isn't that correct?

A It's really the reverse. I may assign judges, senior judges, to criminal matters.

Q And you have done that in the past?

A Yes.

Q Okay. And you are prohibited from assigning criminal matters to referees or to trial referees, isn't that right?

A The answer to your question is yes. The question, though, was in slightly improper form in that I don't assign matters to referees, but they are not allowed to handle the cases.

Q Okay. That's basically what I was getting at.

And —

MR. SCHAEFER: Excuse me. I just want to point out that some of this is covered in the stipulation on what state trial referees can do on criminal cases.

THE COURT: Yes.

MR. GOULD: Well, this is just clarification, your Honor.

THE COURT: All right.

MR. GOULD: I only have a couple more questions.

THE COURT: Go ahead, Mr. Gould.

BY MR. GOULD:

Q Now, you do know of instances, do you not, that trial referees have not been able to serve on, to preside over civil jury trials because parties haven't consented?

A Yes.

Q And as I understand your testimony, it was only one senior judge, Justice Santaniello, who has administrative duties?

A No, sir. He is the only Senior Associate Justice of the Supreme Court, to my knowledge, who has administrative responsibilities.

Q There are other senior judges that do?

A There are other senior judges who do — Judge Satter being one.

Q The one that he mentioned?

A Correct.

Q However, it's fair to say, isn't it, that most of the administrative duties are performed by judges of the Superior Court, isn't that correct?

A Yes, it is.

MR. GOULD: I have nothing further, your Honor.

THE COURT: Yes, sir.

MR. GRAZIANO: Your Honor, if I may just ask one or two questions following up.

CROSS-EXAMINATION

BY MR. GRAZIANO:

Q On the issue of administrative duties. With regard to a judge, generally speaking, how much of their time is spent doing what we associate as judges do: hearing cases, how much time is spent doing administrative duties? Approximately?

A It would depend on the judge. I don't want to bore you with a detailed explanation of our system. Some judges never hear cases, some judges only hear cases, and I think the mix in between would cover every step along the way.

If you want a general ballpark figure, and if you want — how do you want to define "administrative responsibilities"? Because when you say "hearing cases," I would say most of our judges hear cases infrequently. Most of their responsibilities are other than actually presiding over trial of a case.

Q Well, by "hearing cases," perhaps let me explain that.

Having to do with the adjudication of cases, whether it's reading trial briefs or writing opinions, as opposed to administrative things, which I would take to be other than the law-giving, other than being involved in adjudication of cases?

A Would "administrative" then, sir, be assignment of cases? We have master calendars, as well as individual calendars. How would assignment of cases break?

Q I would leave that up to your judgment.

A I would consider that administrative. Therefore, I would say if you would exclude the administrative judges, there are twelve of those, and exclude the presiding judges on civil/criminal — I guess civil and criminal are the major areas, which would probably be another eight to ten, excluding those twenty judges, the remaining portion of the bench would spend the overwhelming majority of their time in case-related activities.

Q Would that also be true of senior judges?

A No. No senior judge presently serves in a capacity that would be considered primarily administrative.

Q And state trial referees?

A Judge Sponzo excepted, because he serves completely in an administrative capacity and he is a state trial referee, excluding Judge Sponzo, the responsibility of the other referees is limited, probably the same as the judges who we did not exclude earlier, as being a mix between administrative and case responsibilities.

MR. GRAZIANO: I have no further questions.

THE COURT: Ms. Emmett?

CROSS-EXAMINATION

BY MS. EMMETT:

Q Judge Ment, I realize that this is probably possible to figure out from the statutes if you can manage to fit them all together, but I was wondering if you could briefly describe, or I will ask you questions and you can tell me if I'm right or wrong, what the options are available to Connecticut's older judges? Perhaps I'll ask a few questions.

As I understand it, after 20 years of service, or at age 65, Connecticut's judges have the option to retire, is that correct?

A Yes.

Q And if a judge chooses to retire, is it also correct that depending on the age that judge is at, he or she will either become a senior judge or a referee, is that right?

A Yes.

Q And prior to the age of 70, any judge who retires will become a senior judge, is that right?

A Yes.

Q And 70 and thereafter, a judge who retires becomes a referee?

A Yes.

Q All right.

THE COURT: Excuse me just one second.

And in either case, Judge Ment, is it not the case that a replacement would be put in the place of the judge who becomes a senior judge or referee?

THE WITNESS: Yes, Judge Cabranes, there's a replacement in either case.

THE COURT: So going back to some of your earlier testimony, what difference would it make for replacement purposes, if any, whether a judge becomes a senior judge or a referee? None, I take it?

THE WITNESS: None. No.

THE COURT: Okay. Go ahead.

BY MS. EMMETT:

Q Judge Ment, along those same lines, we've been talking about the age 70 and the effect it has in the Connecticut judicial system. And am I correct in saying that there are really two effects which that age has:

The first being — you may think of others, but at least two: the first being that if a judge has not retired prior to the age of 70, then under the Connecticut Constitution a judge is required to retire at that time?

A Yes.

Q All right. And the second of the two that at least I think of is that if a judge has already retired and become a senior judge, that when that judge reaches the age of 70 he or she will become a referee, is that right?

A Yes, it is.

Q All right. Now, one thing which is difficult to discern and possibly available in the legislative history, but I am curious about because of the circumstances here, is whether you have any knowledge concerning why the senior judge status was created in the first place?

A Yes, I do.

Q And could you explain to the Court why that is?

A The senior judge status was initiated or created in order to give the judges a second option for retirement.

Q All right. And is it also true that after Connecticut law had changed so that judges under the age of 70 were able to retire, that there was some question in people's minds as to

whether those judges under the age of 70 had constitutional authority or legislative authority to enter judgments, is that right?

MR. GOULD: Objection, your Honor.

MS. EMMETT: That may be a very confusing question.

THE COURT: Overruled. Go ahead.

A I don't know the answer to that question, anyway.

BY MS. EMMETT:

Q All right. With respect to senior judges and referees, am I correct that the pay that they receive is the same — that, in other words, their per diem salary is the same and their retirement benefits vary according to what —

A Between senior judges and referees, I believe it's the same across the board.

Q All right.

THE COURT: Meaning per diem or salary?

THE WITNESS: Meaning the per diem is the same. They receive two-thirds of the salary — well, we have pre-'81 judges and post-'81 judges, but generally speaking they receive two-thirds of the salary, if you're a pre-'81 judge, of the office. A post-'81 judge is two-thirds of the salary at the time that you retire, plus COLA's.

In addition, $125 per day that you work; per diem.

BY MS. EMMETT:

Q Those judges who have retired and become senior judges and referees work only at their option, is that correct?

A Yes.

And perhaps, Judge Cabranes, in response to your question I should point out that they can only earn up to the salary of the office. They can only earn the one-third difference.

The principal other fact is that the five percent retirement fee taken out of the salary of a sitting judge, of a judge, is not taken out of the salary of a referee or a senior judge.

BY MS. EMMETT:

Q Thank you.

Are you aware of, among the senior judges and referees, whether they all work to the maximum amount that they are entitled to work under the current system?

A I am aware that they all do not work to the maximum.

Q There are on occasion I believe, and correct me if I'm wrong, some at least among the referees who may work up to the maximum?

A There are some who work up to the maximum and work beyond the maximum. They're simply not paid beyond the maximum.

Q All right.

THE COURT: Perhaps while Ms. Emmett is up, I can interject a comment and a question, because she may want to pursue this.

The record perhaps does not reflect, but it should reflect the fact that shortly after this case was commenced and the court had entered a temporary restraining order, the court inquired of the parties as to the position or role in this litigation of other members of the state judiciary.

You recall that, Mr. Schaefer, when I asked about that, and —

MR. GOULD: I recall it, yes, your Honor.

MR. SCHAEFER: I do recall it, yes, your Honor.

THE COURT: Yes. Among other things, I was interested to know whether we might expect other state judges to seek to intervene in the lawsuit, whether the plaintiff would seek to bring this action as a class action, or whether the association of state judges intended to participate in any way.

At first blush, I have to say, I had assumed that state judges would have a common interest in these matters and, indeed, that that common interest would be substantially identical to that asserted by the plaintiff, Judge Satter.

Now, it is apparently the case that the only state judges who have elected to state their views to this court are state judges who have asserted views adverse to those of Judge Satter. All of this prompts me to ask counsel a question that perhaps takes us back over some of the terrain already covered by the testimony of Judge Ment, and it is this:

Whether this witness might be an appropriate person to address the question as to what the views of other judges might be? Or to put it another way, as to why no other state judge has apparently elected to side with the plaintiff in this case?

This may not be entirely relevant, but in view of the earlier colloquy with counsel on this matter, it might be useful to have some sense of what the apparent interests are.

MS. EMMETT: All right. Your Honor, I will ask Judge Ment, in view of your concern here, if he has any awareness of what discussion there has been concerning this case within the Judicial Department.

THE WITNESS: Yes, I do.

BY MS. EMMETT:

Q And can you summarize if you will what — I'm not saying that you can say what every judge thinks, but what the nature of that discussion has been?

A The Department in itself, obviously, I am here on behalf of the Department testifying.

With respect to the judges that I've spoken to, and I've spoken to fifty, seventy-five, perhaps a hundred judges of the 150, they are very concerned about this matter. All that I have spoken to feel that the Connecticut system is finely honed in that we have various options for the judges as they proceed to their later years, that it's a fair system, and that it should continue.

Q And are you aware whether the judges' association in its meetings has considered getting involved in this case?

A I attended a meeting where they had a discussion concerning this matter. My recollection is that they thought it would be inappropriate for them to become involved.

THE COURT: This may be an unfair question, Judge Ment, but you obviously know the substance of this lawsuit, and you know your department exceedingly well. The question is unfair because I'm asking you to characterize what an opponent in litigation might want.

But doesn't it strike you that Judge Satter is asserting here some kind of an interest — that is, that were he to prevail, he would obviously be deriving some advantage, would he not? Or is it your view that there is no advantage?

THE WITNESS: I don't think there's a real advantage.

If, in fact, he prevails, he then sits or not sits at my discretion or at the discretion of my successor. I don't think that's any better than what he would have as a referee.

And with respect to his ability to sit on criminal or civil juries, he doesn't have that right if, in fact, I don't assign him to those categories of cases.

So I think it's a question of whether a judge would rather serve in a capacity designated by the Chief Court Administrator, or whether the judge wished to be limited by statute.

THE COURT: But presumably there would be no yearly review, is that right? Or would there be? As a senior judge.

THE WITNESS: There would be no yearly review. However, there would be, I assume, a daily review — that is, if word came to me that was reasonable that a judge was, in fact, not able to sit, that judge would no longer be assigned.

Now, obviously, we don't have that at this point, except in very limited instances, and we don't have a procedure. If we needed one, we would set up a procedure I assume similar to the referee procedure so that I could be assured that individuals serving as senior judges would be qualified to sit.

BY MS. EMMETT:

Q All right. Along those same lines, Judge Ment, you do make a decision about assigning judges on a regular basis, is that right?

A Absolutely, as you well know.

Q How often do you make assignments for the judges to sit?

A We make assignments every six months. We are trying very hard not to move judges except once a year at the most, and hopefully not for two years.

But we do make them every six months, and they're all subject to reassignment every six months.

Q Thank you.

There's just a couple of things that are probably covered in the stipulation or elsewhere, but I'd like to correct one impression.

It is true that in a limited sense a referee is able to sit on criminal cases on a three-judge panel in a murder case, is that not right?

A I believe it is, and I stand corrected.

Q All right. And also on the scheduling issue, is it true that referees are free to schedule their own cases according to the schedule they choose to follow?

A Yes. And they're in great demand, and they can have as many cases as they need.

We don't have referees in places like Danbury, I think there are only two referees in Fairfield County, none in New London. We need referees, and don't have them, so those who wish to can do so.

Q All right. And, in fact, doesn't it happen on occasion that parties go to another judicial location in order to have their cases heard by a referee — for example, I know, or this is a question — isn't it true that some cases from Stamford may be referred to Bridgeport to be heard by the referees there?

A Yes.

Q All right. Now, a senior judge, by contrast, does not function on the self-assignment system, is that right?

A That is correct.

Q And how do assignments — how does a senior judge receive his or her cases?

A Senior judges receive their assignments the same as any other judge — that is, through the mail as I assign them every six months, with one exception: because senior judges have voluntarily elected that status, I normally will consult with a senior judge before she or he has an assignment change.

MS. EMMETT: I have no further questions.

THE COURT: Any other questions, Mr. Gould?

MR. GOULD: I have just one question:

BY MR. GOULD:

Q You say that you don't think that, from what you understand, that judges are really supporting Judge Satter in this case, right?

A Yes.

Q So most of them are probably going to choose the option to retire and become state trial referees, isn't that right?

A I don't know. I think they're not supporting Judge Satter because they're fearful of the consequences from the legislature and others if the suit is successful.

Q You know that there have been some judges who have reached age 70 since this case started and have chosen to retire, rather than join this case, isn't that right?

A That is absolutely correct.

Q If that trend continues, you won't have any problem, will you, in filling that extra seat for that judge once he or she becomes a state trial referee?

A If the trend continues we will have no more trouble than we have now.

Q Thank you.

A You're welcome.

THE COURT: Mr. Graziano, any questions?

MR. GRAZIANO: No questions, your Honor.

THE COURT: Mr. Schaefer?

MR. SCHAEFER: Excuse me. If we could have just a minute, your Honor.

(Pause)

REDIRECT EXAMINATION

BY MR. SCHAEFER:

Q Judge Ment, just a couple questions. Your answers to counsel for the plaintiff's question about that you wouldn't have any problems, judges would continue to retire, is it fair to say that's predicated on the law continuing as it is, there being no change in the state constitutional mandatory retirement provision?

A Yes.

Q And another question: you were asked there have been instances where parties did not consent to civil jury trial

before a state trial referee. I want to ask you: Have there been cases where parties did consent to a civil jury trial before a state referee?

A Yes.

Q And, generally, what does that decision depend on?

MR. GOULD: Objection, your Honor.

How is he going to be able to tell what's going through counsel's mind in every particular case as to whether they're going to object to a certain trial referee? I just think that's totally speculative.

THE COURT: Sustained. But without prejudice to further inquiry.

BY MR. SCHAEFER:

Q Well, do you have any information that would tell you what are the factors that go into whether a party will consent to a jury trial in a civil case before a state referee?

A I do not.

Q All right. But there have been instances where parties do consent to those civil trials?

A Mr. Schaefer, it happens on a regular basis. Trial referees do often preside over jury cases, but I don't know why some are selected and others are not.

MR. SCHAEFER: I think you've answered the question.

Thank you, your Honor.

THE COURT: Thank you very much. Any other questions for Judge Ment?

MR. GOULD: I have nothing further.

THE COURT: Thank you. Absent objection or further comment, Judge Ment may step down.

THE WITNESS: Thank you, Judge Cabranes.

THE COURT: You're excused.

(Witness excused).

THE COURT: I take it that you are resting, Mr. Schaefer?

MR. SCHAEFER: Yes, we are, your Honor.

* * * *

THE COURT:

* * * *

Thank you very much.

We're adjourned.

* * * *

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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HONORABLE ELLIS GREGORY, JR. and
THE HONORABLE ANTHONY P. NUGENT, JR.,
Petitioners,

v.

THE HONORABLE JOHN D. ASHCROFT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

MOTION OF THE MISSOURI BAR FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether state court judges who regularly stand for retention elections are either "elected" officials or appointed officials on the "policymaking level," so as to be excluded from coverage under the Age Discrimination in Employment Act.

(2) Whether a state constitutional provision requiring state court judges to retire at age seventy has any rational basis under the Equal Protection Clause of the Fourteenth Amendment.

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On Writ of Certiorari to the
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MOTION OF THE MISSOURI BAR FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Missouri Bar respectfully moves this Court for leave to file the attached brief of *amicus curiae* in this case. The consent of the attorney for respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The Missouri Bar is a unified bar comprised of all attorneys licensed to practice law in the State of Missouri, approximately 19,000 in number. As such, The Missouri Bar has a unique and transcendent interest in promoting a state judiciary of the highest caliber and integrity.

If permitted to file the attached brief, The Missouri Bar can offer a perspective distinct from that of respondent because of its significant role in the development of the Non-Partisan Court Plan challenged by petitioners. In the attached brief, The Missouri Bar discusses the legislative and constitutional history of Missouri's Non-Partisan Court Plan and the underlying policy considerations prompting inclusion in that plan of a uniform and mandatory retirement age for all trial and appellate judges in the state court system. If this Court permits The Missouri Bar to file its brief of *amicus curiae*, the arguments presented will complement those of respondent and provide additional insight into the laudable objectives served by Missouri's Non-Partisan Court Plan.

Respectfully submitted,

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No. 90-50

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OCTOBER TERM, 1990

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Missouri Bar exists pursuant to Missouri Supreme Court Rule 7. It is a unified Bar comprised of approximately 19,000 attorneys licensed to practice law in the State of Missouri. Accordingly, The Missouri Bar has a unique interest in preserving a state judiciary of the highest caliber and integrity.[1] It was with this interest in mind that The

[1] The preamble to Missouri Supreme Court Rule 7 states: "[I]t is the 'responsibility of the members of the Bar of this Court and of all lawyers who practice in the State of Missouri' to 'strive . . . to improve not only the law but the administration of justice.' " (quoting former Missouri Supreme Court Rule 4).

Missouri Bar assisted in creating and assuring the passage of the Non-Partisan Court Plan embodied in Article V of the Missouri Constitution (the "Missouri Plan"). Petitioners now challenge the mandatory retirement provision of the Missouri Plan. This provision is an integral part of the Non-Partisan Court Plan and The Missouri Bar urges this Court to reject petitioners' contentions.[2]

Prior to the adoption of the Missouri Plan, the abuse of a partisan system of judicial selection had undermined the Missouri public's confidence in its courts. In response, the Non-Partisan Court Plan was created to assure an impartial and independent judiciary. As an original and integral part of that planned system, appellate judges were required to retire at age seventy-five (later modified to require all judges to retire at age seventy). Mandatory retirement provided a counterweight to the advantages of incumbency created by the new system of retention elections. Mandatory retirement further protected the public from the risk that some judges would continue to serve after their capacity to carry heavy case loads or reason clearly had been diminished or impaired by age. In addition to these fundamental protections, mandatory retirement created predictability and provided a means of assuring an orderly removal of judges without the indignity of hearings and impeachments.

The people of Missouri adopted the Non-Partisan Court Plan and its various revisions following extensive debate within the legal community and the public as a whole. The Missouri Plan has been widely emulated by other states and remains a model for the maintenance of an independent and qualified judiciary. The Missouri Bar seeks to preserve intact the Non-Partisan Court Plan which has served the people of Missouri well for the past fifty years.

STATEMENT OF THE CASE

The Missouri Bar adopts the respondent's statement of the facts of the case.

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[2] The Board of Governors of The Missouri Bar (following its established procedures) approved the submission of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Petitioners challenge the validity of Article V Section 26 of the Missouri Constitution on two grounds. They allege that this restriction violates the federal Age Discrimination in Employment Act ("ADEA") and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Neither argument has merit.

The ADEA explicitly excepts from its provisions persons "elected to public office" and appointees "on the policymaking level." 29 U.S.C. 630(f) (1988). A judge selected under the Missouri Plan must stand in a retention election at the end of his or her initial and any subsequent terms. Because petitioners stand for retention election, they are elected officials exempted from the provisions of the ADEA.

Even if petitioners are not "elected" officials within the meaning of the ADEA, they are appointees on the policymaking level and exempt from its coverage. Every judge is a policymaker regardless of judicial philosophy. Even the most strict constructionist is required to interpret legislative intent and resolve unsettled areas of law. Petitioners therefore are not within the protections of the ADEA.

Petitioners' argument that Article V Section 26 violates the Equal Protection Clause is equally without merit. Age is not a suspect classification and therefore petitioners bear the burden of demonstrating that no rational basis could exist for the state's policy. When the mandatory retirement provision is viewed in relation to the Missouri Plan as a whole, the rational basis for this section becomes readily apparent.

The Non-Partisan Court Plan was enacted as a reform measure to Missouri's prior system of partisan election of judges. Under the new system, however, judges were much less likely to be removed from office by the voters. As a result, a mandatory retirement age became preferable. This provision avoided the risk that some judges would continue in office after their mental capabilities and ability to handle a demanding case load had been diminished or impaired by age. In addition, a mandatory retirement age provided a dignified and orderly manner for removing judges from the bench rather than resorting to hearings and impeachment proceedings.

ARGUMENT

I. MISSOURI STATE COURT JUDGES ARE NOT EMPLOYEES WITHIN THE MEANING OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The Honorable Ellis Gregory, Jr., and the Honorable Anthony P. Nugent, Jr., challenge Article V Section 26 of the Missouri Constitution as a violation of the federal Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. §§ 621-634. To gain the protections of the ADEA, however, the petitioners must demonstrate that they are employees within the provisions of the Act. An "employee" is defined as:

> [A]n individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (1988).

State court judges appointed under the Missouri Non-Partisan Court Plan fail to meet this definition in two respects. First, although initially appointed to the bench, judges under the Missouri Plan face regular retention elections and therefore are elected officials expressly excepted from the ADEA's definition of an "employee." Second, if judges are not considered elected officials, they are certainly appointees on the policymaking level. Neither Judge Gregory nor Judge Nugent falls within the definition of an "employee" as set forth by the ADEA. The Eighth Circuit properly upheld the dismissal of their case in the court below.

A. State Court Judges Are Elected Officials Under the Terms of the Missouri Court Plan.

The Missouri Non-Partisan Court Plan provides for the selection of judges in a three-step process. A merit screening commission, consisting of a judge, members of the Bar, and lay persons, nominates three qualified candidates to fill a vacancy on the bench. Mo. Const. art. V, § 25(d). From these candidates, the Governor selects one to be appointed to the bench for an initial term of twelve months. Mo. Const. art. V, § 25(a). Following this initial period in office, each judge must face an election in which the voters of Missouri cast their ballots to determine whether or not the judge should be retained. Mo. Const. art. V, § 25(c)(1).

Because the initial selection process is by means of appointment, the district court erroneously found that these judges were not elected officials. The Eighth Circuit did not address this issue but noted its disagreement with the district court's holding. *Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir. 1990). The Missouri Bar respectfully suggests that the district court was in error because Missouri state court judges reelected under a retention system are "elected officials" within the meaning of the ADEA.

There is no question that the drafters of the Missouri Constitution considered judges to be elected officials. The language of the Constitution expressly discusses the "election" of judges. The provision governing the means by which these judges are selected states that a judge must "file in the office of the secretary of state a declaration of candidacy for election to succeed himself." Mo. Const. art. V, § 25(c)(1). That section further provides that the name of the judge who submits a declaration of candidacy "shall be submitted at said next general election to the voters eligible to vote within . . . the geographic jurisdiction limit of the district where he serves. . .." *Id.* If a majority of those voting deny retention, the judge must step down at the end of his term. *Id.*

The people of Missouri adopted this provision. The Court therefore must look to the common, not technical, meaning given this provision by the voters. According to Webster's Dictionary, an election is "the act or process of choosing a person for office, position, or membership by voting." *Webster's Third New International Dictionary* (3d ed. 1971). This definition does not require two persons to oppose one another on the ballot. The choice presented to the public is the retention or rejection of a judge for office.

The Equal Employment Opportunity Commission apparently agrees with this assessment. According to the Commission, a state court judge "who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.' " EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, *reprinted in* EEOC Compliance Manual (BNA) at N:1001, note 2. The Missouri Bar wholeheartedly agrees with this position.

If judges selected under the Missouri Plan are not considered "elected officials," then the state judiciary would be divided into two classifications with an irrational result never intended by the people. Not all Missouri judges are subject to the Non-Partisan Court Plan. Although all appellate judges are selected and retained under the Plan, a large number of circuit court (trial court) judges must run in partisan elections. The Missouri Plan only applies to circuit courts in the Kansas City and St. Louis metropolitan areas. If the ADEA applies only to judges selected under the Missouri Plan, then judges on an identical jurisdictional level will be treated differently depending on the circuit in which they serve. That is, all judges chosen in partisan elections would be required to retire at age seventy; no judge chosen under the Missouri Plan would be required to retire at any age. All Missouri judges should be treated as "elected officials." The elective process clearly distinguishes *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990).

At most general elections, Missouri voters choose between retaining a judge in office or requiring his or her replacement by some other qualified candidate. This choice is made by casting a ballot and the choice of the majority prevails. The Governor may not intercede; the legislature has no input; the decision belongs strictly to the people. To describe this process as an appointment is to ignore the plain intent and practical operation of the judicial article of the Missouri Constitution and to achieve a result never contemplated by Congress in enacting the ADEA. A judge who serves at the will of the people and who can be voted out of office is, by any reasonable interpretation, an elected official.

B. The Federal Government Should Not Interfere with the Form of Government Selected by the People of Missouri.

Judge Bowman, in the opinion below, and the Second Circuit Court of Appeals, in *EEOC v. Vermont*, noted the importance of states' rights in the procedures for selecting judicial officials. The Missouri Bar has been advised that the respondent will argue that the Supremacy Clause does not apply in this case. The Missouri Bar fully supports the respondent's position and will therefore not reiterate those arguments here, other than to note the important observation of the First Circuit:

> Without question, the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very close to the heart of state sovereignty.

EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988).

C. If State Court Judges Are Not Elected Officials, They Are Appointees on the Policymaking Level.

This issue has been well addressed by the courts and parties below. The Missouri Bar merely adds its voice to the majority of courts which have held that appointed judges are clearly policymakers of the highest level and therefore should not be included within the terms of the ADEA. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *In re Stout*, 559 A.2d 489 (Pa. 1989).

II. THE MANDATORY RETIREMENT PROVISION REPRESENTS A RATIONAL BALANCING OF PUBLIC POLICY BENEFITS

The petitioners allege that Article V Section 26 conflicts with the Fourteenth Amendment to the United States Constitution. Age is not a suspect classification. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). The burden is upon the petitioners to demonstrate that there is no rational basis for the state's

policy. *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980). A rational basis is shown when the mandatory retirement provision is viewed in the context of the entire Missouri Non-Partisan Court Plan and the history leading to its adoption.

The people of Missouri adopted a constitution that was designed to provide a judiciary of the highest caliber. The Non-Partisan Court Plan was a compromise solution to address and balance two concerns of transcendent public interest: (1) creating and maintaining an independent and impartial judiciary; and (2) ensuring that the judiciary was responsible to the people. The method chosen by the people of Missouri to achieve these goals is entitled to the greatest deference. This Court should not tamper with the system established by the people of Missouri absent extraordinary circumstances and public policy considerations that do not exist here.

Prior to implementation of the Missouri Plan, state court judges were selected by partisan vote. *See* Mo. Const. of 1875 art. VI. The result was a highly unsatisfactory mix of politics and justice which severely undermined the confidence of the public in the court system. *See generally*, Crowdus, *Twenty Years of the Missouri Non-Partisan Court Plan*, 18 J. Mo. Bar 122 (1962). "At times the results flowing from this system ranged from the ludicrous to the near chaotic." Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, in Judicial Selection and Tenure 40 (G. Winters ed. 1967). The greatest threat to an independent judicial branch was the dominance of political parties in the selection of judges. "Elections often became rubber-stamp confirmations of the machine's slate, not the Jacksonian ideal of individual and equal expression of free will through the ballot." S. Escovitz, *Judicial Selection and Tenure* 4 (1975). The dominance of politics discouraged qualified candidates and resulted in the election of many judges with little or no qualifications. *Id.* In one instance, a circuit court judge was elected to the bench directly from his practice as a pharmacist. Crowdus, *supra*, at 124. In another instance, a popular judge of the supreme court barely survived reelection after being openly attacked by a notorious but powerful political party boss, Tom Pendergast. *Id.*

The use of partisan elections had other less direct effects on the quality of the judiciary. Judges running on a party ticket were swept in and out of office along with the tides of national politics. Because attorneys were assured no tenure on the bench, they were reluctant to leave a successful law practice for public office. Even when qualified lawyers became judges, precious judicial resources were squandered during their campaigns for reelection. Finally, the qualifications needed to win a general election did not necessarily correspond with those needed to exercise sound judicial discretion. *See* B. Carbon and L. Berkson, *Judicial Retention Elections in the United States* (1980).

The problems created by the partisan election of judges were matters of national concern. Throughout the United States, judicial systems struggled with the balance of politics and an independent judiciary. The debate concerning possible solutions was sharply divided. Some critics suggested that an independent judiciary could be maintained only through the appointment of judges with a life tenure. The only limitation suggested was mandatory retirement at age seventy to seventy-five. Laski, *The Technique of Judicial Appointment*, 24 Mich. L. Rev. 539, 543 (April 1926). On the other hand, the progressive movement argued that persons in such important policymaking positions should be accountable and responsive to the public. B. Carbon & L. Berkson, *supra*, at 2. The net result of this debate was the creation of non-partisan retention elections.

Albert Kales is credited with proposing the first non-partisan court plan in his book *Unpopular Government in the United States* (1914). The Kales plan had three major features. First, a judicial counsel would be created to recommend candidates with appropriate credentials. This would obviate the problem of inappropriate candidates assuming the bench. Second, to make the plan responsive to the public, a Chief Justice would be elected in a partisan election. He then would appoint candidates to the bench. Third, once appointed, the candidates would stand for retention elections until death or mandatory retirement. Kales, "Methods of Selecting and Retiring Judges," an address to the Minnesota Bar Association (Aug. 20, 1914), *reprinted in* 11 J. Am. Judicature Soc'y 133, 134 (1928).

In 1937, the American Bar Association adopted a plan based in significant part on that outlined by Kales, but did not enumerate details. B. Carbon & L. Berkson, *supra* p.12, at 4. This plan, including a mandatory retirement provision, was again approved in 1962. Witners, *A.B.A. House of Delegates Approves Model Judicial Article for State Constitutions*, 45 J. Am. Judicature Soc'y 279, 281 (1962).

In 1940, Missouri became the first state to enact a non-partisan court plan based on the model recommended by the American Bar Association. The Missouri Plan contained three major elements: (1) a nominating committee composed of attorneys, judges and laymen selected three nominees for appointment; (2) the governor appointed one candidate from those nominated; and (3) once in office, the judge would serve twelve months and then face a retention election. The judge could continue to serve as many consecutive terms as the voters allowed.

The Missouri Plan was initially adopted by the Missouri voters through a constitutional initiative in 1940. In 1942, the legislature resubmitted the Plan to the voters claiming the people had not understood its provisions. At this second election, the Plan passed by a margin of 172,521 votes. L. Faust, *Constitution Making in Missouri: The Convention of 1943-44* 100 (1971). The Non-Partisan Court Plan was again at issue during Missouri's constitutional convention of 1943-44. The delegates to the convention retained the Missouri Plan and added a provision requiring all appellate judges to retire at age seventy-five. The voters approved the new constitution in a general election in 1945. *Id.* Finally, in 1970, the voters again approved the Missouri Plan and added the present mandatory retirement provision which is the subject of this proceeding. Thus, the voters of Missouri have had four opportunities to abandon the Missouri Court Plan, including two elections at which mandatory retirement was in issue, and have consistently refused to do so.

During the debates of the 1943-44 constitutional convention, the delegates directly addressed the issue of mandatory retirement. The concerns expressed by these delegates demonstrate the importance of mandatory retirement as part of the Non-Partisan Court Plan as well as

the rational basis that supports it. As one delegate, Judge Mayer, noted:

> There are some men past seventy-five that would be just as good judges as they would have been at fifty but they are the exception and not a rule. I feel that we ought to be very certain that when a judge reached seventy-five, *especially if we have the present court plan*, we ought to be very sure that when he reaches seventy-five he has to retire.

12 *Debates of the Missouri Constitution 1945* 3541 (1945) (One Hundred Fifty-First Day) (emphasis added).

The provision did not pass without debate, however. An opposing position was introduced by Judge Williams who argued that an arbitrary line drawn at age seventy-five would deprive the bar of qualified judges. Judge Mayer responded to this argument: "I hope we won't be burdened here with a lot of sentimentality about old men and wise men and protecting men. We ought to have some common sense about the election of our judges." *Id.* at 3548. Indeed, Judge Mayer argued that the mandatory retirement provision worked to the benefit of a prospective judge. Voters would be more willing to reelect a judge at age sixty-five, if they did not need to be concerned about his service into later years. More importantly, Judge Mayer noted the reality of aging:

> I am no longer a young man but I have brains enough to know that I can't stand the punishment I could a few years ago and any old man here who thinks he can is just fooling himself and there isn't any sense in his doing so. We all know as we grow older we have to let up a little on the work we are doing and we all know that when one of the judges lets up on the work he is doing some other judge has to do it for him or the court gets behind.

Id.

Judge Williams countered that incompetent judges could be removed by means of a hearing committee provided for in Section 28 of the proposed constitution. Judge Mayer again provided the response:

> Now, Judge Williams says that this provision 28 perfectly covers it. In other words, they have got to yank a fellow in and select three judges from the court of appeals and three from the circuit court and three from the Supreme Court and try him because of mental infirmity and physical infirmity and inefficiency. Well, what court, if an old judge can find his way home and back, who had served the country well, would want to drag him in and have that kind of trial? Wouldn't it be a better thing for him to follow the Constitution itself and step out than to be dragged in before that sort of a tribunal which might become necessary as he grew older?

Id. at 3549. After careful consideration and debate, the mandatory retirement provision was put to a vote on the two hundred and tenth day of the convention and was approved by a vote of fifty-nine to eight.

Retention elections combined with merit selection have succeeded in creating an independent and highly qualified judiciary in Missouri. C. Blackmar,Speech to the Kansas City Metropolitan Bar Association (Dec. 14, 1990), *reprinted in* 4 Mo. L. Weekly 1291 (Dec. 24, 1990); Henker, *Experience Under the Missouri Non-Partisan Plan*, in Judicial Selection and Tenure 37, 39 (G. Winters ed. 1967). The use of retention elections, however, requires certain limitations. "When . . . [retention] is the sole issue [on the ballot], it will be extremely difficult to get a popular majority against any fairly successful judge." B. Carbon & L. Berkson, *supra* p. 9, at 6. *See also Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979) (because of the retention system, it is much more difficult to dislodge a judge than an official who must run against another candidate).

This, of course, was the intent of the drafters of the Missouri Plan. Qualified judges screened by a merit commission and appointed by the Governor should succeed in retention elections. "Historical examination . . . reveals that retention elections were initially designed to ensure that qualified judges be retained on the bench." Papier, *Insulating Incumbent Judges from the Vicissitudes of the Political Arena: Retention Elections as a Viable Alternative*, 15 Fordham Urb. L. J. 743 (1987). Unfortunately, the advantage given incumbents may allow

some judges to remain in office past the age at which they can fully perform their duties. Thus, the mandatory retirement provision is a necessary element to counteract the use of retention elections. "Mandatory retirement for judges is rationally related to the difference in the retention rights of judges and other elected officials." *Trafelet*, 594 F.2d at 627.

The Missouri Plan provides a benefit for prospective judges. They are no longer burden with raising funds, political campaigning, the vagaries of public opinion, and the uncertainty of tenure. They must accept retirement at age seventy, however. Although an arbitrary retirement age may require some qualified judges to step down (although they remain eligible for special assignment), the net result of this system is the preservation of a politically independent judiciary with necessary safeguards to assure the highest quality judicial officer.

The Missouri Supreme Court has enumerated several additional grounds which rationally and correctly support the use of mandatory retirement provisions. The court noted the rational for requiring mandatory retirement for teachers. "[U]nrelated to any notion of physical or mental fitness, a state might prescribe mandatory retirement for teachers in order to open up employment opportunities for young teachers or to open up more places for minorities, or to assure predictability and ease in establishing and administering pension plans." *O'Neil v. Baine*, 568 S.W.2d 761, 765-66 (Mo. 1978) (en banc) (discussing *Palmer v. Ticcione*, 576 F.2d 459 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979)). These policy grounds are equally applicable to members of the judiciary. "[A] state might prescribe a mandatory retirement for judges in order to 'open up' judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system." *Id.* at 767.

The Missouri Supreme Court further approved of those justifications previously discussed. "[T]he statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not." *Id.* The court also acknowledge that "age seventy is an age—a time of life—which is recognized by society as being

'about' the time when the physical and mental processes weaken among many men and women." *Id.* In conclusion, the court stated that "compulsory retirement . . . at age seventy embodied in the statute is rationally related to the fulfillment of several legitimate state objectives . . .." *Id.*

Although also noted by the district court below, the remarks of the Missouri Supreme Court bear repeating here:

> Our citizens are entitled to a judicial system of the highest caliber and to judges with the highest possible mental and physical qualifications. Mandatory judicial retirement is an attempt by the general assembly to ensure the fitness of the judiciary as a whole and to ensure the continued competency of the system.

O'Neil, 568 S.W.2d at 766.

Thirty-seven states have enacted mandatory retirement provisions limiting the age at which judges may serve. T. Pyne, *Judicial Retirement Plans* vii (1984). In *none* of these states has a court found that there was not a rational basis for this policy. Despite repeated attacks, the courts have affirmed the right of a state's citizen to place a limit on the age of its judiciary. *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989); *Haten v. Rains*, 854 F.2d 687 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3156 (1989); *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980); *In re Stout*, 559 A.2d 489 (Pa. 1989); *Saetre v. Minnesota*, 398 N.W.2d 538 (Minn. 1986); *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978) (en banc). As in the majority of other states, Missouri has made a rational policy decision to limit the age at which a judge may serve. This Court should respect this decision by the people of Missouri.

CONCLUSION

The Missouri Bar respectfully requests that this Court affirm the decision of the Eighth Circuit. The petitioners in this action are either "elected officials" or appointees on the "policymaking level" and therefore not within the scope of the ADEA. Furthermore, the Missouri Plan does not violate the Equal Protection Clause. The form of government selected by the people of Missouri should be left undisturbed.

Respectfully submitted,

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No. 90-50

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. AND ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Constitutional principles of federalism substantially limit the federal government's right to dictate to the States the terms for selection and retention of persons in core state governmental offices. The question presented is

I.

Whether, in light of these principles, the exemptions in the Age Discrimination in Employment Act for persons "elected to public office in any State" or "appointee[s] on the policymaking level" should be construed to encompass petitioners, who are Missouri judges and hence holders of Missouri core governmental offices? *

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* Although *amici* will not separately address petitioners' equal protection arguments, *amici* do not believe that the equal protection clause of the Fourteenth Amendment prevents the State of Missouri from requiring that its judges retire at the age of seventy years. *See infra* at 17 n.18.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-50

ELLIS GREGORY, JR. AND ANTHONY P. NUGENT, JR.,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case presents questions concerning the lawfulness of a

provision of Missouri's Non-Partisan Court Plan. *See* Mo. Const., art. V, §§ 25-26. The case thus involves a potential area of federal interference with the carefully crafted scheme of judicial selection contained in the Missouri Constitution.

The specter of federal intrusion into a fundamental component of state government—here the tenure of members of the state judiciary—is obviously a matter of utmost importance to all of the States. Moreover, sixteen States have schemes of judicial selection which, like the Missouri Plan, involve initial appointment by the Governor followed by periodic retention elections. *See* Council of State Governments, *The Book of the States* 210-12 (1990-91 ed.).

Amici respectfully submit that the court of appeals correctly decided that Missouri judges are exempt from the application of ADEA and that the Missouri Plan does not otherwise contravene federal law. *Amici* further submit that a contrary holding would be irreconcilable with fundamental precepts of federalism, and submit this brief to assist the Court in its resolution of the case.[1]

SUMMARY OF ARGUMENT

1. Petitioners Ellis Gregory, Jr. and Anthony P. Nugent, Jr., two Missouri state court judges,[2] may lawfully be retired at the age of seventy years pursuant to Art. V, section 26(1) of the Missouri Constitution because they are exempt from the Age Discrimination in Employment Act ("ADEA") under § 630(f) of the Act. Section 630(f) exempts from ADEA's coverage, among other persons, "any person elected to public office in any

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

[2] Petitioners were initially appointed by the Governor of the State of Missouri, and have since stood for retention by election pursuant to Article V, § 25 of the Missouri Constitution.

State" and "appointee[s] on the policymaking level" of state government. The plain language and legislative history of section 630(f) establish that petitioners are both "person[s] elected to public office" and "appointee[s] on the policymaking level". Each of these exemptions applies to petitioners, who retain their judicial positions as a result of a vote of the Missouri general electorate and who exercise broad discretion and powers of decisionmaking in the exercise of core governmental functions as Missouri judges.

2. The conclusion that section 630(f) applies to exempt petitioners, who are state judicial officials performing core state governmental functions, from coverage under ADEA is mandated by longstanding constitutional principles limiting Congress's power to dictate to the States the terms and conditions of employment of their highest ranking core governmental employees. Congress is constrained in its exercise of that power by constitutional principles of federalism as embodied in the structure of the Constitution, the Tenth Amendment, and the Guarantee Clause. Those principles, which underlie the exemptions set forth in section 630(f), prohibit Congress from using the commerce power to determine the identity of core state governmental officials by dictating to the States the terms of the tenure of members of the state judiciary.

ARGUMENT

I. PETITIONERS ARE EXEMPT FROM ADEA'S COVERAGE BECAUSE THEY ARE (A) PERSONS "ELECTED TO PUBLIC OFFICE" OF A STATE AND (B) "APPOINTEES ON THE POLICYMAKING LEVEL" WITHIN THE MEANING OF SECTION 630(f).

The language of section 630(f) and the pertinent legislative history establish that petitioners are exempt from coverage under ADEA and that, accordingly, they may lawfully be retired at the age of seventy years pursuant to Art. V, section 26(1) of the Missouri Constitution. Section 630(f) provides that a person is not an "employee," and is therefore exempt from ADEA's coverage, if he or she is "elected to public office in any State" or is "an appointee on the policymaking level." 29 U.S.C. § 630(f).

A. Petitioners Are Exempt From Coverage Under ADEA Because They Are Elected To A Public Office of the State of Missouri.[3]

Petitioners are exempt from coverage under the ADEA because they are "elected to public office". They hold their public offices after their first appointed term only by virtue of periodic retention elections in which the State's general electorate determines whether to retain them in public office. *See* Mo. Const., art. V, § 25. *See also EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987*, reprinted in EEOC Compliance Manual (BNA) at N:1001, n.2 (concluding that the "elected official" exemption of section 630(f) applies to state judges who are initially appointed and thereafter subject to periodic retention elections). Petitioners' strained argument that

[3] The determination of the court below not to address petitioners' status as elected officials, *see* Pet. App. 4-5, does not preclude this Court from deciding that petitioners are exempt from ADEA under the "elected to public office" exemption. *See, e.g., Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990).

the "elected to public office" exemption applies to persons initially elected to public office but not to officeholders who run in retention elections (Pet. Br. at 13-14) finds no support either in the common sense meaning of the statute's language or in its legislative history.[4] Indeed, the legislative history of section 630(f) establishes that one of the primary purposes of the "elected to public office" exemption was to prohibit federal government interference with the state electorate's selection of public officials. *See, e.g.*, 118 Cong. Rec. 4485 (1972).[5]

A determination that petitioners are not elected officials solely because they were not initially elected to public office would plainly be at odds with this purpose, for it would sanction federal government interference after the electorate had voted to return petitioners to their public office. A determination that Missouri judges such

[4] Section 630(f) was added to ADEA in 1974 as part of a series of amendments extending ADEA's coverage to the States. Pub. L. No. 93-259, § 28(a)(1), (2) (1974). At the time there was little or no debate regarding the meaning and purpose of section 630(f). The language of that section, however, was taken *verbatim* from section 2000e(f) of Title VII of the Civil Rights Act of 1964, which was added to Title VII in 1972 when Congress extended Title VII to the States. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The Congressional debates concerning section 2000e(f) are pertinent in determining the scope of section 630(f). *See id.*

[5] Senator Ervin, the chief proponent of the exemptions set forth in § 630(f), expressed the concern that without the statutory exemptions, it would appear that

> Congress now can pass a bill like this one, that says that a Federal judge can remove a Governor from office—this is not what it says expressly, but what it means—or other elected official of a State or county from office, if that Federal judge finds that the voters of that State elected that Governor because they preferred a man of his race or a man of his religion or a man of his national origin or a person of his sex, rather than a person of some other race or religion or national origin or sex.

118 Cong. Rec. 4485.

as petitioners are not elected officials and are therefore subject to the federal age discrimination laws would create significant pressure on the State of Missouri to abandon its carefully structured plan of initial appointment of judges followed by a popular election for retention in office. Petitioners' reading of the statute would force Missouri to choose between two parts of its constitution: the Missouri Plan and the mandatory retirement provision. If Missouri decided that the mandatory retirement provision served the greater purpose, then the State presumably would be forced to abandon the Missouri Plan and provide for initial election of all judges.

As the court of appeals recognized, nothing in the language or history of ADEA suggests that Congress intended this legislation to pressure the States to choose between an elected and an appointed judiciary. *See* Pet. App. 10-11. Under this Court's teachings, mere inference is an insufficient basis to attribute to Congress an intent to create a device so intrusive into a State's core governmental structure. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240, 242 (1985).

B. Petitioners Are Exempt From Coverage Under ADEA Because They Are Appointees On The Policymaking Level of Missouri's Government.

Petitioners are also exempt from ADEA coverage because they are "appointees on the policymaking level" within the meaning of section 630(f). The plain language of the statute, as well as the legislative history, demonstrate that the purpose of section 630(f) was to exempt from ADEA's coverage public officials at high levels in each of the three branches of state government.

Petitioners argue that section 630(f) merely excludes "policymakers" who work closely with top elected officials. *See* Pet. Br. 16-21.[6] This argument is erroneous.

[6] Petitioners urge this Court to adopt the untenably narrow interpretation of section 630(f) articulated by the Second Circuit in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990). In that case, the court concluded that "Congress meant to deny ADEA protection only to such appointees as would normally work closely with and be accountable to the official who appointed them." *Id.* at 800. The court based this conclusion on the fact that the first and third categories of persons exempted under section 630(f), an elected official's personal staff and immediate advisors, are persons who would work closely with the elected official. The court inferred that the exemption for appointees on the policymaking level shared the characteristics of the first and third exemptions because Congress placed it between them. *Id.* at 798. For the reasons discussed in the text which follows, *amici* submit that this reading of the statute is strained and unpersuasive.

Congress did not limit the exemption simply to "policymakers"; rather, it exempted each "appointee on the policymaking level". 29 U.S.C. § 630(f). This statutory language clearly indicates that Congress intended to exempt a broad category of high level government officials. This exemption extends not only to "policymakers" in the narrow sense asserted by petitioners, but to all state officials who, like judges, exercise similarly important discretionary and decisionmaking powers in the performance of their core governmental duties.

The fact that judges do not work closely with the elected official who appoints them does not diminish their stature as "appointees on the policymaking level." The very nature of their office requires that judges act independently of the official who appoints them. Yet each state judge, as a separate and independent judicial officer, is at the top of his or her "chain of command". *See EEOC v. Massachusetts*, 858 F.2d 52, 56 (1st Cir. 1988). Judges engage in discretionary decisionmaking as do their counterparts in the executive and legislative branches. Neither the executive nor the legislative branches of Missouri's government attempt to set judicial policy. As recognized by the court below, it is the judges of the State who do so. *See* Pet. App. 7-8. *See also infra* at 12 & n. 11. They are the appointees on the policymaking level within their branch of government.

The plain text of section 630(f) undercuts petitioners' argument that Congress intended to exempt only appointees who work closely with the appointing official. *See* Pet. Br. at 21. Of the three appointee exemptions in section 630(f), two are directly aimed at the personal staff and immediate advisors of elected officials. If Congress had intended to exempt only persons who worked closely with the appointing official, it would have included only these two exemptions. Congress chose, however, to add an exemption for appointees on the policymaking level.

Moreover, petitioners incorrectly suggest that Congress intended section 630(f) to shield only members of the executive and legislative branches of government. Congress's placement of the appointee on the policymaking level exemption between exemptions for personal staff and immediate advisors of members of the executive and legislative branches of government does not support the conclusion that Congress intended the exemption to apply only to members of those two branches. As the court below held, *see* Pet. App. 9-10, there is neither a rational basis nor support in the legislative history for such grossly differential treatment of high officers of the three co-equal branches of state government. *See also EEOC v. Massachusetts*, 858 F.2d at 55.[7]

Identical treatment of high officers of all three branches of state government is especially important in view of the fact that many state judges—including many judges in Missouri—are elected *ab initio* and thus also exempt from ADEA under section 630(f). Petitioners' interpretation of section 630(f) leads to the absurd conclusion

[7] The practical effect of petitioners' arguments demonstrate their implausibility. Under the statutory scheme envisioned by petitioners, low-level employees in the legislative and executive branches, as well as law clerks and staff members of elected judges, would be exempt from the ADEA. An appointed state supreme court justice, however, would fall within the ADEA's ambit.

that Congress intended that ADEA apply to appointed state judges but not elected state judges, even when (as in Missouri) both groups of judges may occupy the same level of the State's judiciary. There is no legal basis for the conclusion that section 630(f) covers only two branches of a State's government, and some, but not all, equally situated members of the third branch. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

Congress's intent in enacting section 630(f) must be assessed in light of the strong federalism concerns associated with congressional regulation of a State's judiciary, discussed *infra*. Both the court below and the First Circuit in *EEOC v. Massachusetts* indicated that because the tenure of state judges is of "exceeding importance" to each State, they would require a very clear statement of specific congressional intent to apply ADEA to appointed state judges before they would so interpret section 630(f). Pet. App. 3-4; 858 F.2d at 54-55. Neither court found a specific congressional intent to apply the ADEA to appointed state judges, and therefore each correctly concluded that appointed state judges are exempt from ADEA coverage.

The legislative history of section 630(f) fully supports the conclusion that Congress intended to exempt state judges from ADEA. When the extension of Title VII's coverage to the States was under consideration by Congress in 1972, Senator Ervin insisted that a new provision should be added to provide expressly that Title VII could not be used by federal authorities to dictate the qualifications of a State's core governmental officers. Accordingly, he proposed what ultimately became section 2000e(f) of Title VII and § 630(f) of the ADEA.[8]

[8] Senator Ervin's proposed amendment initially stated:

> Provided, however, that the term "employee" shall not include any person elected to public office in any State or political sub-

Senator Ervin's chief concern in proposing this section was that the federal courts and the EEOC might interpret the extension of Title VII to the States as a license to the federal government to dictate to the States, by imposing certain terms and conditions of employment, whom the States could select as their core governmental officers. *See* 118 Cong. Rec. at 1838, 4096, 4483.[9] Senator Ervin viewed such an intrusion as impermissible under the Constitution's guarantee of independent sovereignty to the States. *See, e.g.*, 118 Cong. Rec. 1837, 4096. *See also infra* at 17-18. Senator Ervin's concern was not limited, as petitioners claim, solely to elected officials and appointees in the executive and legislative branches of state government. To the contrary, Senator Ervin repeatedly reaffirmed his concern that the federal government might improperly seek to interfere with any of a state government's co-equal branches, including the judiciary. He specifically questioned Senator Taft whether:

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division of any State by the qualified voters thereof, or any person chosen by such officer to advise him in respect to the exercise of the constitutional or legal powers of his office.

118 Cong. Rec. 4095. The language concerning "appointee[s] on the policymaking level" was added in conference committee, after the floor debate and comments discussed in the text which follows. Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess. 1972, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2179-80.

[9] For example, Senator Ervin stated:

In other words, this would give the Federal courts jurisdiction to inquire as to what motive a Governor had in selecting men for his cabinet who would give him advice on his constitutional and legal duties, on [sic] if a Governor was actuated in any extent in the selection of an advisor or if the people were actuated in any extent in the election of a public official, so that the [Equal Employment Opportunity] Commission could come in and remove that public official from office and dictate who should be employed in his place.

118 Cong. Rec. 4096.

the bill in its present form would give Federal District courts the ultimate power to compel States and subdivisions of States to yield to their decrees with respect to the employment of persons who exercise the *legislative, executive, and judicial powers* of the States and political subdivisions of states?

118 Cong. Rec. 1838 (emphasis added).[10]

These repeated references to the States' judiciary are very significant. They demonstrate an overarching congressional intent to exclude from ADEA all state officers who perform core governmental functions, including state judges.

II. THIS COURT SHOULD CONSTRUE SECTION 630(f) OF ADEA TO ENCOMPASS PETITIONERS BECAUSE A CONTRARY INTERPRETATION WOULD SUBSTANTIALLY UNDERMINE IMPORTANT PRINCIPLES OF FEDERALISM WHICH LIMIT FEDERAL POWER TO DICTATE RULES FOR THE SELECTION AND RETENTION OF A STATE'S JUDICIARY.

The conclusion that section 630(f) exempts both elected and appointed state judges from ADEA's coverage is compelled by constitutional limitations on Congress's power to dictate rules for the selection and retention of a state's core governmental officers, including its judicial officers.

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[10] Senator Taft agreed that Title VII could not apply to elected state officers, and noted that it was probably necessary to exempt "those at the top decisionmaking levels in the executive and judicial branch as well." 118 Cong. Rec. 1838.

See also 118 Cong. Rec. 1838 (statement by Senator Ervin) ("If this were a constitutional enactment, then the Federal courts would be given jurisdiction to control the ultimate decision as to who is to be the Governor of a State or *the members of the Supreme Court of the State* or the legislators of the State.") (emphasis added); 118 Cong. Rec. 4096 (statement by Senator Ervin) ("the bill is broad enough in its present form to cover Governors of States, *State supreme court justices*, State legislators, and so forth") (emphasis added).

There is no doubt that petitioners are core governmental officers of the State of Missouri. Missouri, like the United States, has chosen a tripartite system of government composed of legislative, executive, and judicial branches. Missouri recognizes in its state constitution that the judiciary is a co-equal part of its sovereign government.[11] Petitioners and their colleagues on the Missouri bench embody the judicial power of the State and accordingly are an integral part of Missouri's core government, not merely "employees" of the State. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (State Supreme Court speaks as sovereign because it is the ultimate body wielding State's power over the practice of law).

Congress enacted ADEA pursuant to its power under the commerce clause. *See* 29 U.S.C. § 621(a)(4) (1982).[12] Congress's power under the commerce clause

[11] Article II, § 1 of the Missouri Constitution states that "[t]he powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confined to a separate magistracy . . . ." Article V, § 1 provides that "[t]he judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts."

[12] Congress specifically provided, as the basis for its enactment of ADEA, the following:

> The Congress hereby finds and declares that—
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> * * * *
>
> the existence of industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. §§ 621(a)(4); 630(g), (h); H.R. Rep. 93-913 (93d Cong., 2d Sess. 1974) (1974 *U.S. Code Congress. & Admin. News* 2811-2812). *See also* 29 U.S.C. § 630(b) which defines "employer" in ADEA as limited to persons "engaged in an industry affecting commerce . . . ".

Some lower courts have concluded, in the context of determining a State's immunity from suit under the Eleventh Amendment, that Congress extended ADEA to the States pursuant to its authority

to regulate the tenure of office of a State's core governmental officers is limited by fundamental precepts of federalism.[13] These principles, which are inherent in the

under section 5 of the Fourteenth Amendment. *See, e.g., Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698 (1st Cir. 1983); *EEOC v. County of Calumet*, 686 F.2d 1249, 1253 (7th Cir. 1982). This Court, however, has left open the question of whether ADEA could be upheld as an exercise of Congress's powers under section 5. *See EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983). *Amici* submit that the plain text of ADEA, and the legislative history surrounding its enactment in 1967 and extension to the States in 1974, prove that Congress was acting pursuant only to its commerce power when it originally enacted and later amended that Act, *See* 29 U.S.C. §§ 621(a)(4); 630(g), (h); H.R. Rep. 93-913 (3d Cong., 2d Sess. 1974) (1974 *U.S. Code Congress. & Admin. News* 2811-2812). Petitioners have not argued to the contrary.

Even assuming that Congress intended to extend ADEA to the States pursuant section 5 of the Fourteenth Amendment, principles of federalism must still be taken into account since Congress is without power by itself to "constitutionalize" age as a suspect classification. Section 5 only authorizes legislation to "enforce" the provisions of the Fourteenth Amendment, and age is not a suspect classification included within the Equal Protection Clause. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *EEOC v. Wyoming*, 460 U.S. at 260-263 (Burger, C.J., dissenting). As explained by Justice Black in *Oregon v. Mitchell*, 400 U.S. 112 (1970):

> The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.

Id. at 127 (announcing the judgment of the Court in an opinion expressing his own views). None of these issues, of course, need be addressed in this case if the Court concludes that petitioners come within the language of the ADEA's exemptions, as argued above in Part I.

[13] Indeed, it can be argued that Congress does not possess plenary power under the commerce clause to regulate the tenure of a State's core governmental officers. *See FERC v. Mississippi*, 456 U.S. 742, 758-60 & n.23 (1982); *Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1967); *see also* Epstein, *The Power of Commerce*, 73 Va. L. Rev. 1387, 1393-95 (1987). The Commerce Clause does not vest

structure of the Constitution and which are manifest in various substantive provisions such as the Tenth Amendment and the Guarantee Clause, have been recognized and applied by this Court and Congress since the founding of our nation. *See, e.g., EEOC v. Wyoming*, 460 U.S. at 265-275 (Powell, J., dissenting).[14] For example, in *Erie R. Co. v. Tompkins* this Court invoked these principles in concluding that a federal court sitting in diversity must apply the law of the State in which it sits:

> The Constitution of the United States . . . recognizes and preserves autonomy and independence in their judicial departments. . . . Any interference with either, except as thus permitted, is an invasion of the authority of the State and to that extent a denial of its independence.

304 U.S. 64, 78-79 (1938), *quoting with approval Baltimore & Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting). *See also Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), *overruled on other grounds, Morgan v. U.S.*, 113 U.S. 476 (1885).[15] Similarly, this Court

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Congress with unchecked authority to regulate all aspects of a State's internal workings; rather, Congress is constrained to regulate that which is "commerce." A sovereign State's method of selecting its core governmental officials, including members of its judiciary, does not constitute "commerce" even under the broadest interpretation and application of that term. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State."). *See also Maryland v. Wirtz*, 392 U.S. at 197; *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911).

[14] *Amici* note that in their citations of the Court's cases concerning federalism they are not unmindful of the effect of later cases on previous rulings. For the sake of simplicity, however, not all such effects have been noted. *See, e.g.*, footnote 13, *supra* (citing *Maryland v. Wirtz*).

[15] As Chief Justice Chase observed in *Texas v. White*:

> [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the

invoked principles of federalism to shield the judicial branch of state government from federal overreaching in *Younger v. Harris*, 401 U.S. 37 (1971), by ruling that a federal court could not enjoin an ongoing state court prosecution.

More recently, in *EEOC v. Wyoming*, this Court (in both its majority and dissenting opinions) reaffirmed the importance and vitality of constitutional principles of federalism in analyzing Congress's exercise of its powers under the commerce clause. The majority in that case, speaking through Justice Brennan, concluded that federalism principles embodied in the Tenth Amendment did not bar application of ADEA to a State's game wardens. The Court nevertheless emphasized that the Tenth Amendment guards against "undue federal interference in certain core state functions" and ensures the "unique benefits of a federal system in which States enjoy a 'separate and independent existence.'" 460 U.S. at 235, *quoting Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869). The Court unequivocally stated that "some employment decisions are so clearly connected to the execution of underlying sovereign choices that they must be assimilated into them for purposes of the Tenth Amendment." *Id.* at 238 n.11. *See also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240, 242 (1985).

These principles, whether derived from the structure of the Constitution, the Tenth Amendment, or the Guarantee Clause,[16] ensure that the States shall retain their

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> Constitution as the preservation and maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

74 U.S. (7 Wall.) at 725.

[16] This Court has recently tended to ground its federalism analysis on Tenth Amendment principles. *See South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226; *FERC v.*

unique sovereignty and right to self-governance; they "protect[] the structure of state government from federal intrusion." L. Tribe, *American Constitutional Law* 396 (2d ed. 1988). Among other things, these principles of law prohibit the enactment of "federal laws that *restructure* the basic institutional design of the system a state's people choose for governing themselves." *See id.* at 397. One of the fundamental attributes of each State's system of self governance is the selection and tenure of core governmental officials. As this Court observ[ed] in *Taylor v. Beckman*, 178 U.S. 548 (1900):

> It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.

Id. at 570-71.[17]

Mississippi, 456 U.S. 742; *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981). Legal scholars have also anchored their analyses of constitutional considerations of state sovereignty in the Tenth Amendment or in the Guarantee Clause of Article IV, section 4. *See, e.g.*, Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 Colum. L. Rev. 1 (1988) and authorities cited therein (arguing that the Guarantee Clause establishes the power of each state to "allocate power among the branches of state government" that lie at the heart of a republican form of government and to "set terms of office for state officials").

Both the Tenth Amendment and the Guarantee Clause plainly are important constitutional affirmations of federalism principles. Nonetheless, federalism—while perhaps "textual[ly] embodied" in the Tenth Amendment or Guarantee Clause—derives its essence from the constitutional scheme as a whole. *See* Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 13 n.72 (1975).

[17] *See also Wilson v. North Carolina*, 169 U.S. 586, 594 (1898) ("In its internal administration[,] the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation

A sovereign State such as Missouri has a substantial interest in maintaining the right of its citizens to determine the criteria for selection and tenure of members of its judiciary. Many rational goals are served by such criteria. For example, providing for retirement of judges at age seventy allows a greater number of qualified persons to participate in the judicial branch. Moreover, judges in Missouri are retained pursuant to elections for six to twelve year terms. *See* Mo. Const. art. V, § 23. The length of judicial terms thus decreases opportunities for removing a judge without resort to the public removal process of Missouri's Constitution. In these respects, among others, a State's interest in mandatory retirement of judges differs significantly from the application of similar criteria by private employers.[18]

In enacting section 2000e(f) of Title VII and later incorporating that section *verbatim* into ADEA as section 630(f), Congress was legislating against the backdrop of these constitutional principles of federalism and well-recognized interests and expectations of the States. Moreover, the legislative history of these sections reveals that Congress was not merely aware of these constitutional principles, but that Members specifically invoked these principles in support of statutory limitations such as section 630(f). As Senator Ervin explained in support of the amendment of Title VII to include the exemption provision,

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of an office for purely state purposes and of the terms upon which it shall be held.").

[18] Thus, as the court below found, Missouri's mandatory retirement provision is a rational method by which Missouri may serve its legitimate goal of maintaining a highly qualified and representative state judiciary. *See* Pet. App. at 13-16. For this reason, petitioners' argument that Missouri's mandatory retirement provision violates the equal protection clause of the Fourteenth Amendment is meritless. *See also EEOC v. Massachusetts*, 858 F.2d at 57-58.

> [C]ertainly one of the powers of government that was reserved to the States by the 10th amendment was the power of a state to select its own officers . . . because if the Federal judiciary could tell the State whom it can have for its officers and whom it can have for its employees, the federal judiciary becomes the real ruler of the people of the State and really, in the ultimate analysis, imposes its will upon the State and its people.

118 Cong. Rec. 4483. *See also id.* at 4096. Senator Ervin emphasized the dangers inherent in such federal intrusion into state government. "I know of no way in which Congress can more effectively destroy the States," he said, "than for Congress to vest in the Federal judiciary or in any other Federal department or agency, the power to select the officers and employees of the State and its political subdivisions." *Id.* at 4483. *See also id.* at 1838 (recognition by Senator Taft of the need for the definition of "employee" in section 2000e(f) to remain within "the constitutional limitations involved").

The final version of § 630(f) exempted a broad class of high-ranking state officials—those appointed at the policymaking level. The Joint Explanatory Statement observed that the purpose of the exemption is to ensure that Title VII (and later ADEA) was not applied to state officials with broad discretionary and decisionmaking power at the "highest level" of state government. 1972 U.S. Code Cong. & Admin. News 2179-80. In short, the Congressional purpose in enacting § 630(f) was to ensure that the federal courts and the EEOC, in interpreting and applying Title VII and ADEA, did not overstep the constitutional limitations on federal intervention in the workings of state government by dictating to the States rules for the selection and retention of their highest ranking officers, including the judiciary.

Consistent with these constitutional limitations, *amici* respectfully submit that this Court should interpret section 630(f) in a manner that effectuates Congress's recognition of the limits placed upon it by the principles of federalism. If Congress, under the guise of the commerce power, can dictate to the States terms for selection and retention of judges, there are no principled limits on Congress's power under the commerce clause to usurp the essence of a State's sovereignty. At a minimum this sovereignty encompasses the power "to choose—subject only to constitutional limits—who is to be part of the state's government." *EEOC v. Wyoming*, 460 U.S. at 253 (Burger, C.J., dissenting).[19]

Neither *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), nor *South Carolina v. Baker*, 485 U.S. 505 (1988), compel a contrary conclusion. *Garcia* dealt with Congress's power to regulate the terms of employment of a municipality's transit employees and contains nothing to suggest that the reasoning or result in that case can be extended to a high state official such as a judge. *See* 469 U.S. at 554. Moreover, the *Garcia* Court stated that it "continue[s] to recognize that the

[19] Other courts have relied upon principles of federalism in holding that section 630(f) encompasses state judges. In addition to the court below, *see* Pet. App. at 4, these include *EEOC v. Massachusetts*, 858 F.2d at 54, *In Re Stout*, 521 Pa. 571, 559 A.2d 489 (1989), and *Apkin v. Treasurer & Receiver General*, 401 Mass. 427, 517 N.E.2d 141, 145 (1988).

These courts declined to hold that ADEA regulates the selection and retention of appointed state judges because that statute does not contain "a clear congressional mandate" in support of federal activity in this area already subject to state law. They held that such a mandate is required because the selection and retention of state judges—whether appointed or elected—"strike very close to the heart of state sovereignty." *EEOC v. Massachusetts*, 858 F.2d at 54. *Cf. EEOC v. New York*, 907 F.2d 316 (2d Cir. 1990) (because a State's sovereignty was directly implicated by the regulation of its elected judicial officials, it was proper to consider state law in construing 630(f)'s "elected to public office" exemption); *Schlitz v. Virginia*, 854 F.2d 43 (4th Cir. 1988) (state judge's ADEA claim, based on failure of legislature to reappoint him, held barred by legislative immunity doctrine).

States occupy a special and specific position in our constitutional system, and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Id.* at 556. *See also id.* (declining to "identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause") (*citing Coyle v. Oklahoma*, 221 U.S. 559 (1911)).

Baker likewise provides no basis for holding that Congress can employ the commerce power to regulate a State's selection and retention of judges. In that case the Court held that a federal tax on state bearer bonds did not violate constitutional principles of federalism. *See* 485 U.S. at 515. This holding was predicated upon a factual finding by the Special Master that federal bond registration requirements would not affect the States' ability to raise debt capital. *Id.* at 529 (Rehnquist, C.J., concurring). *Garcia* and *Baker*—in stark contrast to petitioners in this case—did not call upon the Court to eviscerate core state sovereignty interests that rise to the level of the rules for the selection and retention of state judges.[20]

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[20] The majority opinion in *Baker* contains broad *dicta* that the Tenth Amendment and constitutional principles of federalism provide no substantive limitations on Congress's power under the Commerce Clause and that a State's only protection from congressional overreaching is through the political process. As Justices Rehnquist and Scalia observed, however, such an extreme position was unnecessary to resolve that case and was unwarranted by this Court's decision in *Garcia* in which it recognized the continued vitality of federalism principles and that those principles continued to provide affirmative limitations on the power of Congress under the commerce clause. *See* 485 U.S. at 528, 529. *See also Apkin*, 401 Mass. at 431-32, 517 N.E.2d at 143-44.

The proposition that federalism has no substantive content and that the political process is the only arena in which a State can seek to protect its sovereignty has been soundly criticized by a number of legal scholars. *See, e.g.*, Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985); Merritt, supra, 88 Colum. L. Rev. at 14-18. These commentators argue that States are not adequately protected by the federal political process because members of Congress, although coming from the States, become federal employees confronted with and surrounded by federal issues, different constituencies, and nationwide lobbying organizations whose purposes are often at odds with state sovereignty. *See, e.g.*, Merritt, *supra*, 88 Colum. L. Rev. at 15-17. These commentators further argue that there is no sound legal precedent for the Court to abandon, with respect to regulation under the commerce clause, its longstanding role and obligation "to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States." *See, e.g.*, Van Alstyne, *supra*, 83 Mich. L. Rev. at 1724. *See also Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting); *Garcia*, 469 U.S. at 566-67 (Powell, J., dissenting).

Amici respectfully submit that to the extent this Court concludes that *dicta* in *Garcia* or *Baker* might permit the conclusion that Congress can dictate to the States the terms for selection and retention of core governmental officers, this Court should narrowly limit such *dicta* and foreclose that result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-50

ELLIS GREGORY, JR. AND
ANTHONY P. NUGENT, JR., JUDGES,
Petitioners,

v.

JOHN D. ASHCROFT,
GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. WLF engages in litigation in a variety of areas and has been particularly active in cases which concern

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[1]Counsel for all parties have consented to the filing of this *amicus* brief. Their consents are on file with the Clerk of this Court.

misguided and overbroad applications of federal civil rights laws.

To this end WLF has filed briefs *amicus curiae* in a number of the leading Supreme Court cases involving issues of civil rights. *See, e.g., International Union v. Johnson Controls*, No. 89-1215 (decision pending 1991); *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S.Ct.1997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United States v. Weber*, 443 U.S. 193 (1979).

WLF also appeared as *amicus curiae* before this court on a number of occasions to discuss issues relating to the proper interrelationship between the national and state governments. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990); *Howlett v. Rose*, 110 S.Ct. 2430 (1990); *Pennsylvania Department of Public Welfare v. Davenport*, 110 S.Ct. 2126 (1990); *United States v. Spallone*, 110 S.Ct. 625 (1990).

WLF believes that the national government and state governments have important roles to play in our federal system of government. The application of the federal Age Discrimination in Employment Act to state judges is an unwarranted intrusion into the legitimate affairs of the states that has no statutory basis and is prohibited by the Tenth Amendment to the United States Constitution.

Because of the unique perspective of WLF in its commitment to promoting a balance between state and federal rights and powers, this brief will bring relevant matter to the attention of the Court that will not be brought to the attention of the Court by other parties.

STATEMENT

The Missouri Non-Partisan Court Plan (the "Missouri Plan"), Mo.Const. art. V, § 25, is the seminal framework for the merit selection of state court judges. Petitioners are Missouri state court judges who were initially appointed and have been retained by popular election under the Missouri Court Plan. In Missouri, the merit selection system applies to judges of the Supreme Court, the intermediate court of appeals, and certain circuit courts. *Id.* Under the Missouri Plan, when a vacancy occurs on these courts the governor initially appoints a judge from a panel of candidates determined by merit screening commissions. *Id.* The appointment is always "for a term ending December thirty-first following the next general election after the expiration of twelve months in the office." *Id.*, § 25(c)(1). A judge may continue for a full term in office after his appointed term by declaring his "candidacy for election to succeed himself," and obtaining a favorable majority vote. *Id.* The judge may thereafter be reelected upon the expiration of each full term of office provided, however, that retirement at the age of seventy is mandatory. *Id.* and § 26.

Petitioners, direct beneficiaries of the Missouri Plan throughout their judicial careers, now seek to avoid the plan's mandatory retirement provision, claiming that the plan violates the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982 and Supp. 1987) ("ADEA").[2] In particular, petitioners contend they are covered employees under the ADEA, notwithstanding that the ADEA's definition of employee plainly exempts both

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[2]Petitioners also claim that the Missouri Plan as applied to them violates the equal protection clause of the fourteenth amendment. While this *amicus* views the equal protection issue as being without merit, the issue is not addressed herein as it is otherwise fully briefed.

persons "elected to public office" and "appointee[s] on the policymaking level." 29 U.S.C. § 630(f). Given (1) the absence of any intent whatsoever on the part of Congress to preempt the Missouri constitutional provisions governing that state's judges; (2) the language of the ADEA exemptions themselves; and (3) the tenth amendment guarantee of state sovereignty, petitioners' challenge to the Missouri Plan should be rejected by this Court as it has been by both the court of appeals and the district court.

SUMMARY OF ARGUMENT

By enacting the ADEA Congress did not intend to preempt state law governing selection, retention, and tenure of state court judges. Absent a clear, unequivocal manifestation of congressional intent to the contrary, provisions such as those of the Missouri Plan may not be disturbed by application of a federal statute. There is nothing in the ADEA or its legislative history upon which to base a valid finding of preemption in this area of vital importance to the states.

In addition, the ADEA's exemption of persons "elected to public office" and of "appointees on the policymaking level," 29 U.S.C. § 630(f), dictates that state court judges are not within the scope of the ADEA. State judges make policy in the course of deciding legal controversies and supervising the state judicial systems. State judges who must submit to election, moreover, whether they are initially elected or retained by election following an initial appointment, are elected officials.

Finally, the tenth amendment prohibits application of the ADEA to state court judges. To apply the ADEA would unconstitutionally infringe upon the states' sovereignty, and would contravene core principles of federalism.

ARGUMENT

I. THE ADEA DOES NOT PREEMPT STATE LAWS PROVIDING FOR MANDATORY RETIREMENT OF STATE COURT JUDGES

The issue presented by this case, which petitioners treat as a technical question of statutory construction, is in fact one of federal preemption. The question, therefore, is whether Congress, in enacting the ADEA as a whole, clearly and unequivocally manifested an intent to displace state constitutional and statutory provisions governing the selection, retention, and tenure of state court judges.

Although the court of appeals framed the issue in precisely these terms, 898 F.2d at 600, petitioners in their brief do not attempt either to make the showing required under the law of preemption or to argue that no such showing is necessary. Instead, petitioners argue that because the ADEA is a "remedial" statute, the presumptions run in favor of a "narrow construction" of the exemptions, and thus a construction of the statute as a whole that is broad enough to create a conflict with -- and preemption of -- state law. In fact, as the authority on preemption reveals, the reverse is true: far from a presumption in favor of preemption, the presumption is heavily against it, especially in matters as closely related to the traditional role of the states as those involved in this case.

The vital interest a state has in establishing its own judicial system cannot seriously be disputed. The Missouri Plan has served as a model for other states in

eliminating partisan judicial selection. Members of the public, as well as the bench and the bar, are the beneficiaries. *See, e.g.*, W. Crowdus, Twenty Years of the Missouri Nonpartisan Court Plan, J. Mo. Bar (March 1962), *reprinted in* 32 J. Mo. Bar 370 (July-Aug. 1976). Mandatory retirement, which allows for orderly attrition, furthers the overall objectives of the Missouri Plan.

Mandatory retirement lessens the incentive for judges of retirement age to "governor shop" or "commission shop" by timing their retirement to precede or follow anticipated political changes. It also avoids the unseemly prospect of judges trading retirement for other consideration such as increases in retirement pay and benefits, and reduces the likelihood of age becoming a factor, intentionally or otherwise, in reelection campaigns. It thereby furthers the overall goal of the Missouri Plan to depoliticize judicial selection and retention.

Mandatory retirement also expands opportunities for other qualified members of the bar to seek judicial posts. This facilitates the influx of fresh ideas into the judicial system, and the maintenance of a high-quality judiciary. Mandatory retirement increases opportunities for women and minorities to share in judicial appointments. Predictable judicial turnover ensures that the state judiciary can reflect more closely the present societal makeup, and facilitates the governor's ability to redress past inequities. Governor Ashcroft's recent selections for the appellate bench illustrate this: six of the last eleven appellate court judges appointed have been women, including the first woman to serve on the state's supreme court. Fourteen women or minority judges have been selected from the twenty panels submitted to the governor which contained such candidates.

Mandatory retirement also avoids arduous and often perplexing determinations as to which judges, after a certain age, are physically and mentally qualified and which are not. Without mandatory retirement, competency hearings would be necessary. This would only tend to diminish public confidence in the judiciary and expose judges to undue stress and embarrassment.[3]

Whatever weight a particular state might give these considerations in formulating that state's policy on judicial selection and tenure, it cannot be denied that they are legitimate and compelling concerns. Petitioners nevertheless would have the Court find that a function as basic to state government as establishing the framework for the state judicial system has been swept aside by Congress' enactment of the ADEA. "[I]n light of the significant intrusion into properly state-dominated affairs that such a finding would entail," it is necessary "to see if Congress clearly and unequivocally manifested an intent to regulate the requirements a state can impose on those who hold office in the state's judiciary." *EEOC v. Massachusetts*, 858 F.2d 52, 54 (1st Cir. 1988). The court of appeals in this case aptly recognized that because "the tenure of state judges is a matter of considerable importance to a state," an initial determination must be made as to whether in enacting the ADEA "Congress explicitly and unequivocally manifested its intent to preempt state law in this area." *Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir. 1990). "Unless Congress conveys its purpose clearly, it will not be deemed to have signifi-

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[3]All of this is not to say that the state underestimates the valuable contributions judges who pass the mandatory retirement age may make. In Missouri, a consenting retired judge may be assigned by the Supreme Court as a senior judge to any state court or as a special commissioner. Mo. Const. art. V, § 26(3). Thus, at the discretion of its Supreme Court, the state welcomes continued service of these judges.

cantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.*

In this case there is no indication whatever, much less a clear and unequivocal manifestation, that Congress intended to displace state laws governing the selection and tenure of state judges. As petitioners themselves concede, the legislative history of the ADEA is "devoid" of any meaningful commentary in this regard. Petitioners' Brief at 18. The only real expression of congressional intent in this regard is the language of the exemptions, which by their terms and existence show that Congress actually sought to avoid any conflict with state law.

The legislative history petitioners cite is of virtually no value in resolving the issues in this case. They argue that the legislative history of Title VII should be unblinkingly applied in the absence of ADEA legislative history simply because definitional text from Title VII was used in the ADEA. This Court unanimously rejected a similar argument in *Tafflin v. Levitt*, 493 U.S. ___, 110 S.Ct. 792, 797 (1990), in which it refused to apply its interpretation of the Clayton Act to the RICO statute merely because the two acts contain similar language. The "'mere borrowing of statutory language does not imply that Congress intended to incorporate all of the baggage that may be attached to the borrowed language.'" *Id.* (citation omitted).

The Title VII history upon which petitioners rely, Petitioners' Brief at 18-21, involved legislation dealing with discrimination on the basis of race, sex, and religion,

so the question of mandatory retirement was not involved. When the Title VII definition of "employee" was incorporated in the ADEA, moreover, even the ADEA did not implicate that question, because the ADEA at that time was inapplicable to employees over 65 years of age. Congress, therefore, did not consider the potential impact of the ADEA on the mandatory retirement provisions of state law when it adopted the ADEA's definition of "employee." "Far more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action." *New York State Dep't. of Social Serv. v. Dublino*, 413 U.S. 405, 417 (1973).

It is important to bear in mind that mandatory retirement is not all that is at stake in this case. If the ADEA applied to state judges, it would apply even to their initial selection, and to their retention by the voters. It is highly unlikely Congress intended that unsuccessful candidates for state court judgeships could invoke the power of the federal courts to challenge an appointing authority's selection of younger judges or the electorate's refusal to retain a particular judge. That result, however, is the logical consequence of petitioners' argument.

The purpose of the ADEA's exemptions was to avoid exactly the type of conflict with state law that petitioners urge the Court to find in this case. If Congress had intended that judicial appointments, retention, and tenure be subject to the ADEA, there would be some hint of that intent in the statutory language or the legislative history. If Congress had intended to preempt the laws of the numerous states whose constitutions or statutes provide for mandatory retirement of state court judges, it would have said so.

A. The Court Of Appeals Correctly Ruled That State Judges Are "Appointees On The Policymaking Level"

The issue addressed by both courts below is whether petitioners are "appointee[s] on the policymaking level." Several state and federal courts also have addressed this question. *See EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *Schlitz v. Virginia*, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); *In re Stout*, 521 Pa. 571, 559 A.2d 489 (1989); *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 517 N.E.2d 141 (1988). Consistent with the decisions below, the courts in *Massachusetts*, *Illinois*, and *Stout* have ruled that judges are "appointees on the policymaking level." The *Apkin* court did not decide the policymaking issue, but nevertheless concluded that the ADEA does not extend to state judges. This leaves only the *Vermont* and *Schlitz* decisions as judicial support for the strained reading of the ADEA that is now urged on this Court by petitioners. *Schlitz* is particularly poor support, for from the two *Schlitz* opinions, petitioners can find solace in only a single conclusory sentence of a footnote of the district court opinion, asserting without analysis that state judges are not policymakers. 681 F. Supp. at 331. n.1.

In *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 280 (1896), this Court stated:

> *The public policy of the government is to be found* in its statutes, and when they have not directly spoken, then *in the decisions of the courts* and the constant practice of the government officials.

Id. at 340 (emphasis added); While "policymaking" is often used to describe "an aspect of the functions of high-level executive and legislative officers...," *EEOC v. Massachusetts*, 680 F. Supp. 455 (D. Mass.), *aff'd*, 858 F.2d 52 (1st Cir. 1988), it is nevertheless clear that:

> "policymaking" is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents. . . . Moreover, the substantive interest identified by the phrase "on the policymaking level" is closely aligned with an interest referred to by phrases such as "exercise of discretion" and "exercise of judgment," which are indisputably descriptive of most of the performance of those persons within the judicial branch who serve as judges (including trial judges).

680 F. Supp. at 462.

The policymaking role of a state supreme court is addressed further in *In re Stout*, where the Pennsylvania attorney general brought a *quo warranto* proceeding to remove an appointed justice of the Supreme Court who had during her appointive term reached the mandatory retirement age of 70. In refusing to apply the ADEA the court noted:

> As can be seen we are charged with charting a definite course of action for the judiciary, and to select our method of action from various alternatives at hand and in light of these conditions to guide and determine the present and future course of this branch of government. It cannot be seriously argued that this is not policymaking, for as our Attorney General pointed out during his

> well-reasoned argument on the subject, our policymaking power is vast indeed. Having so concluded, we find no vitality in the Respondent's argument.

559 A.2d at 497.

Lest it be thought that the idea of judges making policy is an abstraction without application in the state of Missouri, it should be noted that Missouri by statute prescribes that court decisions can establish the common law. Mo. Rev. Stat. § 1.010 (1988). Indisputable examples of judicial policymaking are found in recent Missouri court decisions. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *aff'd*, ____ U.S. ____, 110 S.Ct. 2841 (1990) (ruling that parents or other legal guardians lack authority to decline nourishment on behalf of a comatose person); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983) (rejecting the "last clear chance" doctrine and judicially adopting the Uniform Comparative Fault Act as the law of Missouri). The members of the Supreme Court are empowered to establish rules of conduct for the state's judiciary and bar, Mo. Const. art. V, § 5, promulgate rules governing practice and procedure in the Missouri courts (*see, e.g.*, Mo. R. Crim. P., 19-36; Mo. R. Civ. P. 41-102), and fashion mandatory pattern jury instructions, Missouri Approved Instructions-Criminal (Mo. Sup. Ct. Pub. 3d ed.); Missouri Approved Jury Instructions (West 3d ed.). Inferior state courts create local rules that further govern practice before those courts. *E.g.*, Missouri Western District Court of Appeals Special Rules, *reprinted in* Missouri Rules of Court (West 1991); Rules of the Twenty-First Judicial Circuit of Missouri, *reprinted in* Missouri Court Rules Handbook (Butterworth Issue 4 1990). The Supreme Court also is the arbiter of disputes within the Missouri judicial branch. *See, e.g., In re Rules of Circuit Court of Twenty-First Judicial Circuit*, 757 S.W.2d 590 (Mo. 1988); *In re Rules of Circuit Court of Twenty-First Judicial Circuit*, 702 S.W.2d 457 (Mo. 1985). Thus, both in deciding cases before them and in supervising the judicial system, Missouri judges make policy,[4] a fact that was recognized and thoroughly considered by the court of appeals. 898 F.2d at 601-02.

Petitioners assert that the exemption for policymaking appointees should be limited because it is found among other exemptions that apply primarily to the executive and legislative branches of government. As the court of appeals observed, however, 898 F.2d at 603, that argument leads to the illogical result that *none* of the four categories of exemptions from coverage of the ADEA would apply to employees in the judicial branch in states where judges are appointed. This construction of the ADEA is implausible.

Petitioners rely primarily upon *Vermont*, in which the Second Circuit ruled that the exemption applies only to appointees "working closely with the elected officials who appointed them." 904 F.2d at 798. Adoption of that ruling, however, would effectively preclude the judicial branch of government in any state from qualifying for the exemption, as appointed judges do not work closely with

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[4] "Policymaking" has been defined in common parlance as the act of elaborating policy, as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions," or as "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." Webster's Ninth New Collegiate Dictionary at 910 (1985 Edition). Courts clearly meet these definitions in their policymaking activities. Judges, whether state or federal, appointed or elected, often elaborate upon policy considerations, regularly choose among alternatives in making decisions, and routinely make conclusions as to desirable goals and procedures. These actions have an impact not only on litigants before the court, but on all persons within the court's jurisdiction.

the appointing authority. But there is no indication in the ADEA, in its legislative history, or in other sources that Congress intended to exempt only executive and legislative policymakers. On the contrary,

> . . . Congress did not strictly limit the exception to policymakers, but rather applied it to all those "*at a policymaking level*." This appears to be a somewhat more flexible standard, which requires us to look at the position of the appointees within government structure, and not so much at the particular duties of the persons involved.

Massachusetts, 858 F.2d at 56 (emphasis added); *see also Illinois*, 721 F. Supp. at 159 ("Absent an express Congressional intent to limit the exception to the legislative and executive branch, a rational reading must include high ranking state officials in all these branches").

Schlitz, the other case upon which petitioners principally rely, is equally unpersuasive. In that case the state's mandatory retirement law had not been invoked; instead, the legislature had simply failed to reappoint the plaintiff judge. The district court conducted no analysis of the policymaking exemption, 681 F. Supp. at 331 n.1, and the court of appeals found it unnecessary even to reach the question, holding that the legislature's decision was immune from review under the ADEA. 854 F.2d at 44-46.

The narrow construction of the policymaking exemption for which petitioners argue is not supported by statutory language, legislative history, persuasive legal authority, or even the common meaning of "policymaking." It should be rejected.

B. Missouri Judges Are Elected To Public Office Within The Meaning Of The ADEA

In addition to his argument that petitioners are policymakers within the meaning of the ADEA, respondent argued in the district court that petitioners are also exempt from the provisions of the ADEA because they are elected officials. In a footnote, the district court disagreed with that argument. *Gregory v. Ashcroft*, No. 88-0221C(3) (July 14, 1989) at n.1, *reprinted in* Petition at A-17 to A-26. Respondent did not cross-appeal on that point, but urged the elected official exemption as an alternative ground of affirmance. Eighth Circuit Brief of Respondent at 20-21.[5] The court of appeals did not reach the issue, although it indicated its inclination to disagree with the district court's statement. 898 F.2d at 600. The issue, however, may be reached by this Court as an alternative ground for affirming the decision below.[6]

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[5]It is doubtful that there was any actual requirement, and possibly no basis, for respondent to cross-appeal, since it does not appear that the district court's comments concerning the elected official exemption served in any way as a decisional basis for its dismissal of petitioners' claim. It thus was proper for respondent simply to urge the elected official exemption as an alternate ground for affirmance by the Eighth Circuit. *See, e.g., Nichols v. City of St. Louis*, 837 F.2d 833, 835 (8th Cir. 1988) (court of appeals may affirm district court judgment on any ground supported by the record).

[6]It is particularly true in cases coming from the federal courts that this Court may consider a matter not specifically passed upon by the court below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). It is prudent to do so when the issue at hand is of a nature such that it will likely recur and a decision by the Court will serve the interests of judicial administration. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Most recently, the Court has been willing to construe a federal statute in a manner not con-

(continued...)

Judges selected pursuant to the Missouri Plan are "elected officials" within the meaning of the ADEA. After serving an initial term of office, a Missouri Plan judge may become a candidate for election to succeed himself. The name of the judge is then submitted to the voters at the next general election. If a majority votes for retention, the judge may remain in office until the expiration of another term, at which time he may again submit his name for retention. If the voters vote not to retain the judge, a vacancy exists which is filled by appointment.

Petitioners argue that they do not fall within the elected official exemption because they are initially appointed, not elected to office, and because judges have no opposition in retention elections. Neither argument has merit. There is nothing in the ADEA to suggest that an official's initial entry into public office must be by election for the elected official exemption to apply. Nor is there any suggestion that an official is "elected" only if the election is contested. To imply such a requirement, moreover, would lead to absurd results. For instance, in a locale where one political party happens to predominate, the candidate of that party may find himself unopposed in the election. If petitioners' reading of the ADEA were correct, any such candidate, irrespective of the office

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[6](...continued)
sidered by the court of appeals or addressed by the parties. *Arcadia v. Ohio Power Co.*, 111 S.Ct. 415, 418 (1990). And where, as in this case, a serious constitutional issue would confront the Court absent statutory grounds for decision, *see infra* § II (tenth amendment violation), the Court has strongly favored consideration of all potentially dispositive statutory matters. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582-83 (1979). "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Build. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

involved, would be outside the ADEA's elected official exemption simply because there was no opposing candidate on the ballot.[7] The ADEA merely states that it does not apply to persons "elected to public office in any State or political subdivision of any State by the qualified voters thereof . . ." 29 U.S.C. § 630(f). When the statute is applied in accordance with its plain terms, there is no doubt that petitioners are exempt.

Petitioners' initial appointments were for limited terms which have long since expired. According to certified copies of letters of appointment, petitioner Gregory was appointed in December 1978 and petitioner Nugent was appointed in December 1980. Appendix at 1-3. Both appointments were effective "for a term ending December 31st following the next general election after the expiration of twelve months . . . ." *Id.* Thereafter, to remain in office, petitioners were required to "declare *candidacy for election* to succeed [themselves] . . . ." Mo. Const. art. V, § 25(c)(1) (emphasis added). Petitioner Nugent was retained by election in 1982. Official

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[7]In actuality, judges placed before the electorate for retention do have opposition. Their opposition is the entire pool of persons qualified for judicial appointment. The voters may well decide that they prefer whoever the appointing authority might select to replace the judge who appears on the ballot. It is not a matter of supposition that voters can refuse to retain a judge. Research discloses that one Missouri judge has been voted out of office. R. Watson and R. Downing, The Politics of the Bench and Bar--Judicial Selection Under the Missouri Nonpartisan Court Plan at 225 (1969). In 1986, the entire nation followed the heated and expensive election campaign in which the chief justice and two other justices of California's supreme court were removed by the voters. Disproving the political adage that "you can't beat somebody with nobody," Californians chose "none of the above." A judge who faces the voters for retention is like any other incumbent whose name is on the ballot. Either can lose his office at the election of the people. They are elected officials in the practical sense of that term, and no rational distinction can be made for purposes of the ADEA.

Manual State of Missouri at 1335 (1983-84) (November 2, 1982 general election returns). Petitioner Gregory was retained by election in 1980, 1984, and 1988. Official Manual State of Missouri at 1281 (1981-82) (November 4, 1980 general election returns); Official Manual State of Missouri at 1297 (1985-86) (November 6, 1984 general election returns); Missouri Roster at 142 (1989-90) (November 8, 1988 general election returns).[8] Petitioners declared their candidacy for election and a total of four times have been "elected to public office." Having sought the people's vote, they are in a poor posture to deny they were elected to public office.

The Equal Employment Opportunity Commission ("EEOC"), the federal agency that enforces the ADEA, 29 U.S.C. § 625, agrees with this interpretation of the "elected official" exemption. Agency interpretations are entitled to considerable weight when a court considers the meaning of a statute. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n. 17 (1942). They are persuasive because they represent the "view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *Id.*

In response to a request from Congressman Pepper for an opinion on the applicability of the ADEA to appointed state court judges, the EEOC stated:

> Based on a thorough consideration of the exclusion and of the legislative history associated with

[8]Upon retention by election, petitioner Nugent, a judge of the court of appeals, and petitioner Gregory, an associate circuit court judge, have twelve- and four-year terms of office respectively. Mo. Const. art. V, § 19.

> it, the Commission is of the view that a state or local court judge who is elected by the general electorate or who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.'

April 7, 1987 Letter to Rep. Claude Pepper, *reprinted in* EEOC Compliance Man. at N:1001, n.2 (BNA). The EEOC's letter makes clear the agency's view that judges such as petitioners are "elected officials" under the ADEA. This conclusion is not altered by the fact that a judge may initially be appointed. It is the elective nature of their posts after appointment which is significant, and which ultimately distinguishes these judges as "persons elected to a public office."

II. APPLICATION OF THE ADEA TO STATE COURT JUDGES WOULD INFRINGE ON STATE SOVEREIGNTY IN VIOLATION OF THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The position advocated by petitioners poses a serious threat to the rights of the state of Missouri and, indeed, to all states. It is difficult to identify a matter more properly left to the states than establishment of the qualifications for service in the state judiciary. If federal intrusion into this vital state function can be justified, virtually no aspect of a state's sovereignty is secure. The Bill of Rights provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Nowhere in the Constitution is any aspect of the power to regulate state

judiciaries delegated to the federal government or prohibited to the states. If the tenth amendment has any meaning, or if any of the meaning it has lost is to be restored, petitioners' claims must be rejected.

As demonstrated, *supra*, the Court would have every reason to conclude on grounds short of reaching this constitutional question that the ADEA does not apply to petitioners or persons similarly situated. However, should the Court be persuaded that Congress clearly intended a sweeping preemption of state law in enacting the ADEA, the Court's inquiry is not at an end. Petitioners strike at the core principles of federalism upon which our nation and its government were founded. For petitioners to succeed, the Court must conclude that the tenth amendment does not protect a state's interest in its own judiciary; and that Congress is better equipped to dictate to the states how this function should be performed. Because such an outcome would be so completely repugnant to our federal system, petitioners cannot be allowed to prevail.

A. This Court's Decision In *Garcia v. San Antonio Metropolitan Transit Authority* Should Be Overruled

There has been considerable recent debate over Congress' power to regulate state and local government actions. Much of that debate has taken place within this Court. *See South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC v. Wyoming*, 460 U.S. 226 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *National League of Cities v. Usery*, 426 U.S. 833 (1976). The issue of state sovereignty raised by these cases has engendered conflicting opinions among

individual members of the Court. The holdings themselves illustrate the volatility of the issue.

In *National League of Cities*, the Court defined the limits the tenth amendment places on congressional power to regulate the activities of state and local governments. 426 U.S. at 841. Two years later in *Hodel*, those limits were summarized as follows:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citations omitted; quoting *National League of Cities*). The Court further stated:

> Demonstrating that these three requirements are met does not . . . guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies state submission.

Id. at 288 n.29 (citations omitted).

Subsequently, the Court held in *Wyoming* that application of the ADEA to state and local governments

"was a valid exercise of Congress' powers under the Commerce Clause." 460 U.S. at 243. The majority, ostensibly acting in accordance with *National League of Cities*, reasoned with respect to a state retirement provision governing game wardens that the ADEA did not "'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions.'" *Id.* at 239.

In actuality, the result reached by the majority ran "afoul of the three prongs of the *National League of Cities* test. . . ." *Id.* at 258 (Rehnquist, J., dissenting). The dissent thoroughly analyzed the relation of the ADEA to the state retirement provision then at issue, and rightly concluded that the ADEA should not have been applied against the state of Wyoming. This analysis is of equal moment to the tenth amendment issue in the present case. As the Chief Justice stated, "[n]othing in the Constitution permits Congress to force the states into a Procrustean mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system." *Id.* at 265 (Rehnquist, J. dissenting).[9]

In 1985, the same majority which began the erosion of *National League of Cities* in *Wyoming* overruled *National League of Cities* outright. *Garcia*, 469 U.S. 528. The majority's primary stated basis for rejecting *National League of Cities* was a purported difficulty in defining "traditional governmental functions." 469 U.S. at 538.

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[9]*Wyoming* should not, as petitioners assume, be casually read to bring this case under the purview of the ADEA. *Wyoming* stands only for the proposition that the ADEA may apply to some state employment situations, *Apkin*, 517 N.E.2d at 143, and the officials in that case were game wardens, not judges. There is no indication that the Court contemplated in *Wyoming* that state judges would seek to avoid the operation of state law under the ADEA.

Ironically, this majority had encountered no such difficulty in *Wyoming*, disposing of the "traditional governmental function" issue in a single sentence: "The management of state parks is clearly a traditional state function." 460 U.S. at 239. Nevertheless, the *Garcia* majority rejected the principle of judicial protection of state sovereignty and held that state sovereignty is adequately protected by "the national political process." 469 U.S. at 555.

The result of the *Garcia* holding is that the members of Congress "are the sole judges of the limits of their own power." *Id.* at 567 (Powell, J., dissenting). *Garcia* nevertheless was reaffirmed in *Baker*, 485 U.S. 505, in which the same majority held that "[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." 485 U.S. at 513 (emphasis in original).

As observed by Justice O'Connor, *Garcia* and *Baker* represent an abandonment of the "constitutional role" of the Court because it "failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as in the principles of federalism implicit in the Constitution." *Baker*, 485 U.S. at 533-34 (O'Connor, J., dissenting). The Chief Justice has forecast that the time will come for the principle of state sovereignty to be revitalized. *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting). The Court should take this opportunity to overrule *Garcia* and resume its constitutional role.

B. Application Of The ADEA In This Case Would Be Unconstitutional Under *National League of Cities v. Usery*

Under the abandoned *National League of Cities* analysis, the ADEA as applied to state court judges would violate the tenth amendment. First, the ADEA regulates the "states as states." *Wyoming*, 460 U.S. at 237. Second, as applied in the manner urged by petitioners, it addresses an "undoubted attribute of state sovereignty." As the First Circuit observed in *Massachusetts*:

> Without question, the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very closely to the heart of state sovereignty.

858 F.2d at 54. Third, the management and regulation of the court system is a "traditional governmental function." *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (administration of justice by the states is a "primary governmental function").

There is no federal interest in applying the ADEA to state court judges that "justifies state submission." *National League of Cities*, 452 U.S. at 288 n. 29. Even assuming that there is some federal interest in prohibiting mandatory retirement of state judges, that interest is certainly not a compelling one. If it were, Congress would not have explicitly left states with the option of imposing mandatory retirement on judges under the "elected official" exemption. Given this exemption for "elected officials," every state judge in the United States could be subject to mandatory retirement if every state

were to adopt election as its sole method of selecting judges.[10]

Application of the *National League of Cities* test will rarely provide as well-defined an answer to issues of state sovereignty as it does in this case. Difficulty of application, however, is an insufficient reason for the Court to abandon the approach in favor of that in *Garcia*, which relies on Congress' "underdeveloped capacity for self-restraint" as the states' only protection of their sovereign interests. *Garcia*, 469 U.S. at 588 (O'Connor, J., dissenting).

C. Application of the ADEA in This Case is Unconstitutional Even Under *Garcia v. San Antonio Metropolitan Transit Authority*

Should the Court decline at this juncture to reexamine *Garcia*, the Court nevertheless should find that application of the ADEA to appointed state court judges is invalid

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[10]While some may contend that this is only a theoretical possibility, there exists a real probability that application of the ADEA to appointed judges would create an incentive for many states to change their current methods of selecting judges. For instance, a state which appoints all of its judges may determine that its interest in controlling judicial tenure is more important than any method of judicial selection. That state could maintain its mandatory retirement provisions for judges by changing its method of selection from appointment to election. If this were to occur, the only effect of the ADEA's application would be to force the state to change its method of judicial selection. Obviously, such a result would not serve any purpose for which the ADEA was enacted. There is no identifiable federal interest in influencing the states' choice of how judges are selected. *Cf. Pocker v. Brown*, 819 F.2d 148 (6th Cir. 1987); *Holley v. Askew*, 583 F.2d 728 (5th Cir. 1978) (both cases rejected constitutional challenges to state provisions for appointment rather than election of judges).

even under the "national political process" analysis applied in *Garcia*.

Petitioner's argument that appointed judges are not exempted from the coverage of the ADEA relies, at best, on congressional ambiguity. The ADEA does not define a "policymaker" or contain a definition of what constitutes the "policymaking level." There is neither a mention of judges nor a differentiation between elected and appointed judges within the ADEA. Indeed, there is no indication that Congress even considered application of the ADEA to appointed state court judges.

> [T]he conclusion is inescapable that, if Congress had contemplated the matter, it would have exempted all State judges from the ADEA. Nothing in the legislative history of the 1986 amendment indicates that Congress intended the amendment to apply to judges, and certainly there is nothing to indicate that Congress intended the amendment to apply to some State judges and not to others. The more closely the statute is examined, the more unavoidable becomes the conclusion that this anomaly is a product of congressional inadvertence.

Apkin, 517 N.E.2d at 145.

To accept petitioners' construction of the ADEA would result in the invalidation of a substantial number of states' mandatory retirement provisions as applied to appointed judges. It would expose appointing officials of the states to suit under the ADEA by any potential appointee who may claim that he was not appointed due to his age. Absent a clear and unequivocal statement of congressional intent to visit such a drastic imposition upon the states, this interpretation would not only violate

the preemption doctrine, but would also reflect a glaring defect in the national political process:

> Congress's deliberate choice should be expressed in a clear statement of intent when a federal statute impinges on areas that implicate State sovereignty as intimately as the structure of a State's judicial branch. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relie[s] to protect states' interests."

517 N.E.2d at 144-45 (quoting L. Tribe, *American Constitutional Law* § 6-26, at 480 (2d ed. 1988) (emphasis in original)).

This follows from even the most restrictive reading of *Garcia*. As Justice Scalia maintained in his concurrence in *Baker*, however, there are, despite the trend launched by *Garcia*, "affirmative limits *the constitutional structure* might impose on federal action affecting the States . . . ." 485 U.S. at 528 (Scalia, J., concurring) (emphasis in original). While the Court has not identified what those limits might be, there can be no doubt that some substantive constraints still exist in deference to state sovereignty. Those constraints are certainly reached when Congress attempts to control the states' judicial systems. There are limits to federal power, and petitioners would carry us beyond them.

Application of the ADEA to appointed judges "would produce a helter-skelter, irrational pattern throughout the country." *Apkin*, 517 N.E.2d at 146. The Court can prevent such an irrational, unintended, and unconstitutional result by holding that all state court judges, appointed and elected, are exempt from the provisions of the ADEA by

virtue of the tenth amendment. Such a holding would provide consistency and fairness among and within the states, regardless of their method of judicial selection. Perhaps more importantly, such a holding would address meaningfully the impropriety of applying a federal statute so as to thwart the states' exercise of control over primary functions of the states. Most importantly, such a holding would allow the Court to reassume its vital and proper role in safeguarding the principles of federalism embodied in the Constitution.

CONCLUSION

For the reasons stated herein, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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February 15, 1991

APPENDIX

STATE OF MISSOURI
ROY D. BLUNT
SECRETARY OF STATE

I, ROY D. BLUNT, Secretary of State of the State of Missouri, and Keeper of the Great Seal thereof, hereby certify that the annexed pages contain a full, true and complete copy of the letters of appointment for Anthony P. Nugent, Jr., Douglas William Greene, Flake L. McHaney, and Ellis Gregory, Jr. as the same appears on file and of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, this 7th day of February, A.D., 1991.

ss/Roy D. Blunt
Secretary of State

App. 2

EXECUTIVE OFFICE
STATE OF MISSOURI
JEFFERSON CITY

Joseph P. Teasdale
Governor

December 23, 1980

SECRETARY OF STATE

Sir:

I have the honor to advise that I have this day made the following appointment:

Anthony P. Nugent, Jr., 655 West 61st Terrace, Kansas City, Jackson County, Missouri 64113, as Judge of the Missouri Court of Appeals, Western District, for a term ending December 31st following the next general election after the expiration of twelve months in said office. Vice: Judge Ben W. Swofford, retired, effective December 28, 1980.

Please issue Commission accordingly.

Respectfully submitted,

ss/Joseph P. Teasdale
Governor

ATTEST:

Secretary of State

App. 3

EXECUTIVE OFFICE
STATE OF MISSOURI
JEFFERSON CITY

Joseph P. Teasdale
Governor

December 22, 1978

SECRETARY OF STATE

Sir:

I have the honor to advise that I have this day made the following appointment:

Ellis Gregory, Jr., 5132 Crosswood Drive, St. Louis County, Missouri, as Judge of the Magistrate Court, District 13, St. Louis County, Missouri, effective immediately; for a term ending December 31st following the next general election after the expiration of twelve months in said office.

Please issue Commission accordingly.

Respectfully submitted,

ss/Joseph P. Teasdale
Governor

ATTEST:

Secretary of State

Supreme Court, U.S.
FILED
FEB 15 1991
OFFICE OF THE CLERK

No. 90-50

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ELLIS GREGORY, JR., et al.,
Petitioners,
v.
JOHN D. ASHCROFT,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE COLORADO, FLORIDA, HAWAII, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEW JERSEY, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, and WYOMING SUPPORTING RESPONDENT.

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No. 90-50

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELLIS GREGORY, JR., et al.,
Petitioners,

v.

JOHN D. ASHCROFT,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

Interest of Amici

Amici are States concerned about maintaining the constitutional principles governing the federal-state balance. They file this brief to address the constitutional implications of petitioners' claim that Congress has purported to regulate the tenure of appointed state judges.

Some of the amici States will be affected immediately by this Court's decision in this case, because their judges are appointed and must retire upon attaining a certain age. Such requirements generally are set forth in the provisions of state constitutions which create the framework of state government and provide for the selection and tenure of state constitutional officers.[1/]

Other amici States elect, rather than appoint, their judges, or do not provide for their mandatory retirement on the basis of age. Those States nevertheless join in this brief because of the importance of the decision in this case to the constitutional principles protecting the authority of the States to govern themselves independently.[2/]

1/ The Massachusetts Constitution, for example, has governed the selection and tenure of judges since the people of the Commonwealth established the judiciary as an independent branch of government in 1780. See Mass. Const. Pt. I, Art. XXIX (right of every citizen to judicial impartiality and independence); Pt. I, Art. XXX (powers of government separate "to the end that it may be a government of laws and not of men"); Pt. II, Ch. 2, sec. 1, art. 9 (judicial officers appointed by the Governor with the consent of the Executive Council); Pt. II, Ch. 3, art. 1 (judicial tenure).

SUMMARY OF ARGUMENT

I(A). Under Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the main protection for the States' independent existence lies in the national political process. In order to ensure that this protection is effective, it is essential that this Court require a clear statement of congressional intent before construing

2/ For the Court's convenience, the judicial tenure and selection provisions of the amici States other than Massachusetts are set forth in an addendum to this brief.

federal legislation to preempt state sovereignty. The clear statement rule guarantees that Congress has in fact faced the preemption issue squarely and that the federal-state balance is not disturbed inadvertently . Pp. [6-14].

I(B). Petitioners' claim that the Age Discrimination in Employment Act (ADEA) preempts state constitutions and laws governing the tenure of judges requires a clear statutory expression of congressional intent, because the asserted federal intrusion affects a fundamental and integral part of the government of the States. The ADEA in fact contains no clear statement showing that Congress intended to intrude upon state sovereignty in this area. Pp. [14-24].

II. As a rule, statutes should be construed to avoid serious constitutional questions. Petitioners' proposed interpretation of the ADEA would interfere with the States' authority over the tenure of the highest officers of the judiciary, one of the co-equal branches of state government; it is extremely doubtful that Congress has the constitutional authority to carry out such an intrusion. The Garcia decision recognized that there exist federal constitutional limits upon Congress' power to interfere with the constitutional structure of state governments. Congress did not intend to test those limits through amending the ADEA, and the statute should be construed accordingly. Pp. [25-36].

ARGUMENT

I. CONSTITUTIONAL PRINCIPLES REQUIRE THAT CONGRESS CLEARLY STATE ITS INTENT TO PREEMPT STATE JUDICIAL TENURE PROVISIONS. IT HAS NOT DONE SO.

Petitioners' principal claim is that Congress has pre-empted the choices made by Missouri -- and other States -- regarding judicial tenure by enacting a series of amendments to the Age Discrimination in Employment Act ("ADEA"). This claim strikes at the heart of state sovereignty, since it contemplates federal regulation of the tenure of constitutional officers of state governments. The petitioners' proposed interpretation would limit the authority of the States to determine matters integral to their essential framework of government. Constitutional principles of federalism require, at the very least, a clear statement of

congressional intent as a condition to finding preemption in this area.

A. A Clear Statement Of Congressional Intent Is Always Required For Alteration Of The Federal-State Balance. Here, It Is Constitutionally Required.

This Court has repeatedly held that even to preempt routine state regulation of private industry, Congress must clearly state its intent. It is fundamental that "we are not to conclude that Congress legislated ouster of [a state statute] in the absence of an unambiguous congressional mandate to that effect." Florida Avocado Growers v. Paul, 373 U.S. 132, 146-47 (1963) (concerning state regulation of the oil content in avocados). "Where . . . the field that Congress is said to have preempted has been traditionally

occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985), quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." Jones v. Rath Packing Co., supra, 430 U.S. at 525 (citation omitted). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced,

and intended to bring into issue, the critical matters involved in the judicial decision." United States v. Bass, 404 U.S. 336, 349 (1971).

The requirement of a clear and specific statement is even more important if and when Congress intends to interfere with state interests or to abrogate rights which the States enjoy under the Constitution. E.g., Dellmuth v. Muth, 491 U.S. ___, 105 L. Ed. 2d 181, 187 (1989) (because it would upset "the fundamental constitutional balance between the Federal Government and the States," Congress may abrogate state immunity from suit in federal court only by making its intention "unmistakably clear in the language of the statute," quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)); Port Authority Trans-Hudson Corp. v. Feeney,

495 U.S. ___, 109 L. Ed. 2d 264, 272 (1990) (same); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) (Congress must "unambiguously" express its intent to impose conditions on States pursuant to federal grants); New York Department of Social Services v. Dublino, 413 U.S. 405, 413 (1973) (Social Security Act did not show "clear manifestation of intention" to preempt state regulations regarding conditions for welfare benefits); United States v. Bass, 404 U.S. 336 (1971) (federal criminal statute construed narrowly so as not to preempt state statute criminalizing same conduct).

The petitioners in this case argue that Congress has overridden the solemn choices of the people of the several States on an essential aspect of their government: the tenure of their judges.

This is an extraordinarily sensitive area in our federalist constitutional structure and our democratic form of government. It requires a correspondingly clear statement of Congress' intent to preempt.

The decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), makes the requirement of a clear statement as a condition of preemption even more compelling. In Garcia, this Court held that "the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." 469 U.S. at 556. The

main protection of state sovereignty after Garcia is thus the national political process, based on the assumption that the States will be able to argue their interests in the course of congressional debate. The clear statement rule is a logical and essential corollary to the Garcia decision. The process of debate and accomodation envisioned by the Garcia decision can take place only if intent to preempt is explicitly stated in legislation, so that both the States and Congress are aware of what is at issue and so that the federal balance is not disturbed inadvertently. See Bass, supra, 404 U.S. at 349; Odom, The Tenth Amendment after Garcia: Process-Based Procedural Protections, 135 U. Pa. L. Rev. 1657, 1676-77 (1987).

It would be inconsistent with Garcia's reliance upon the political process for this Court to conclude, without clear and specific evidence in the statutory language, that Congress intended to preempt the States' choices as to judicial tenure. See L. Tribe, American Constitutional Law § 6-26, at 480 (2d ed. 1988) ("[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests"). Without a clear statement demonstrating that Congress has faced and decided the issue, the courts should not hold that federal legislation has interfered with state autonomy. See EEOC v. Commonwealth of Massachusetts, 858 F.2d 52, 53-54, 58 (1st Cir. 1988); Apkin v. Treasurer &

Receiver-General, 401 Mass. 427, 431, 517 N.E.2d 141, 143-146 (1988) (both applying a clear statement rule in upholding a judicial mandatory retirement provision against ADEA attack).

B. Congress Has Not Clearly Expressed An Intent To Preempt The States' Choices Concerning The Tenure Of Their Judges.

Petitioners assert that Congress chose to limit the States' freedom to make their own choices concerning judicial tenure by amending the ADEA in 1974. This argument is made even though the alleged conflict between state and federal laws was, at that time, only theoretical. Moreover, there is no evidence that Congress in fact faced, and intended to decide, the critical issues involved in the question presented to the Court in this case.

Indeed, the language and history of the ADEA amendments make it quite clear that Congress did not decide to intrude upon the States' choices as to judicial tenure.

The language of the ADEA defines its coverage in broad and general terms; there is no specific reference whatever the judiciary. Indeed, the 1974 amendment to the ADEA is notable for its lack of specificity. The amendment did enlarge the definition of the term "employer" to include "a State or political subdivision of a State," Pub. L. No. 93-259, § 28, 88 Stat. 55 (1974), but the law makes no reference to any particular branch of government, let alone to the state judiciary. Thus, although the petitioners argue that the very generality of the 1974 amendment extends the ADEA to judges, there is no

specific evidence in its language that Congress intended to do so.

Congress did insert in this definition exceptions for elected officials, for their close advisors, and for appointees on the policymaking level. See 29 U.S.C. § 630(f). These exceptions indicate that Congress did not intend to test the limits of its constitutional authority at the expense of state sovereignty, but rather that it wished to avoid infringing upon the States' independent authority over the structure of their governments.

Moreover, the petitioners' interpretation of the ADEA would produce an anomalous result. Those States that appoint judges would be prohibited from enforcing their mandatory judicial retirement provisions, but States that elect their judges would not be so

prohibited, because of the elected official exception. It is extremely unlikely that Congress intended that the ADEA apply so inconsistently to state judiciaries. This anomaly was highlighted by Judge Keeton in a recent decision:

> The underlying concerns manifested by the adoption of this exception emphatically do not include a congressional interest in taking sides on the currently active controversy within many states about whether judges shall be elected or appointed. Yet, plaintiff's proposed reading of the statute would introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have state judges appointed. Is it a reasonable interpretation of this definition of "employee" that the Act was designed to accomplish this rather significant intrusion into state political choices? Quite apart from other concerns addressed below, an affirmative answer hardly seems defensible.

EEOC v. Commonwealth of Massachusetts, 680 F. Supp. 455, 461 (D. Mass.), aff'd, 858 F.2d 52 (1st Cir. 1988). The clear statement rule requires that Congress express its clear intention "in unmistakable language in the statute itself," Dellmuth, supra, 105 L. Ed. 2d at 187, which it plainly did not do in this case.

Petitioners nevertheless suggest that legislative history can show an intent to preempt. But even if the history of an otherwise ambiguous statute could establish preemption, it would not do so in this case.

The legislative history of the 1986 amendment to the ADEA, which eliminated the age-seventy cap and thereby gave rise to the asserted conflict between the ADEA and state judicial mandatory retirement provisions, does not even

mention the applicability of the ADEA to state judges. There is no discussion whatsoever of the impact of the amendment on the state judiciary. See H. Rep. No. 95-527 (1978); S. Rep. No. 95-493 (1978); H. Rep. No. 99-241 (1986); S. Rep. No. 99-146 (1986). As the Massachusetts Supreme Judicial Court observed, after scrutinizing the relevant legislative records: "It seems clear that Congress did not even consider the consequences of the 1986 amendment on the State judiciary." Apkin, supra, 401 Mass. at 435, 517 N.E. 2d at 146. Similarly, the history of section 630(f) contains no mention of any congressional decision to affect state judicial tenure. As Judge Keeton concluded: "It is simply not a credible inference that a majority of the Members of Congress, voting on this matter,

would have formed this intent [that elected judges be excepted from the ADEA and appointed judges be covered], and acted upon it, without one word of comment about it in the legislative history. For that to have happened, the issue would have had to be either noncontroversial or inconsequen- tial. It was, in fact, neither." EEOC v. Commonwealth of Massachusetts, supra, 680 F. Supp. at 464.

Because the legislative history of the ADEA does not support their claims, the petitioners rely on the history of a 1972 amendment to a different statute, Title VII. If anything, however, the legislative history of the Title VII amendment supports the contrary conclusion -- that Congress intended to exempt from federal control all "persons who exercise the legislative, executive

and judicial powers of the States." EEOC v. Commonwealth of Massachusetts, 858 F.2d 52, 55 (1st Cir. 1988), quoting 118 Cong. Rec. 1837 (1972).[3/] Moreover, amici have found no reference to Title VII in the legislative history

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3/ Any argument that Congress intended to distinguish between elected and appointed state officials would be wrong. The relevant language of Title VII exempts both elected and appointed officials, and nowhere is there any indication of congressional awareness that it might be treating elected and appointed judges differently. Moreover, if it was Congress's intention to respect the choices made by the voters of the various States, that intention would be furthered by giving effect to popularly-voted constitutional provisions regarding the selection and tenure of state judges. See, e.g., Apkin v. Treasurer & Receiver-General, 401 Mass. at 428, 517 N.E.2d at 142 (1988) (Massachusetts mandatory retirement provision enacted by overwhelming popular vote). "This expression of choice is at least on a par with the election of a particular judge." EEOC v. Commonwealth of Massachusetts, supra, 858 F.2d at 57.

of the 1974 ADEA amendments. Instead, Congress' 1974 decision to extend the ADEA to the States was only a small part of a major piece of legislation amending the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. The ADEA amendment was described as "a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local government employees," H. Rep. No. 93-913, 93d Cong., 2d Sess. 40 (1974) (Committee on Education and Labor); S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974) (Committee on Labor and Public Welfare). As a result, it seems much more likely that the members of Congress thought of the scope of section 630(f), if they thought about it at all, in the context, not of Title VII, but of the FLSA.

Finally, even if it could be shown that one Congress in 1972 had intended to apply Title VII to some (but not all) state judges, that would not demonstrate that a different Congress intended to preempt the States' choices as to their judiciaries when amending the ADEA in 1974. This is particularly true where different considerations would have applied to the respective preemption determinations. These differences include variations in the scope of Congress' authority when acting under the Commerce Clause rather than the Fourteenth Amendment (see Part II, infra) as well as Congress' awareness that age discrimination is not generally characterized by the same invidiousness and malicious animus which is associated with racial discrimination. See Report of the Secretary of Labor, The Older

American Worker: Age Discrimination in Employment (1965) (submitted to Congress in connection with the original enactment of the ADEA in 1967; see EEOC v. Wyoming, 460 U.S. 226, 230-31 (1983)). Thus, the legislative history of the 1972 amendment of Title VII by another Congress does not and cannot show that the 93rd Congress, by amending the ADEA in 1974, consciously intended to preempt States' choices as to their judiciaries.

Because Congress did not clearly and specifically express any intent to preempt the States' choices as to judicial selection and tenure in the ADEA, the decision below should be affirmed.

II. THE PETITIONERS' PROPOSED INTERPRETATION WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS. IT SHOULD THEREFORE BE REJECTED.

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530-54 (1985), this Court held that state sovereignty imposes limitations on the Commerce Power primarily in a political sense. However, the Garcia Court also indicated that some judicially enforceable "fail-safe" limitations remain on congressional action, stating: "These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Id. at 556, citing Coyle v. Oklahoma, 221 U.S. 559 (1911) (Congress lacks power to dictate location of state

capitol).[4/] To apply the ADEA to restrict the States' choices for the tenure of their judges would exceed the remaining affirmative limits on federal preemption of state governments identified in Garcia.

Amici recognize that the attempt, in National League of Cities v. Usery, 426 U.S. 833 (1976), to draw boundaries of state immunity from federal regulation in terms of "traditional governmental functions" was overruled by Garcia. But even severe critics of National League of Cities have expressed the view that this Court should continue to limit Congressional intrusion into state

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4/ See also South Carolina v. Baker, 485 U.S. 505, 528 (1988) (Scalia, J., concurring); id. at 530 (O'Connor, J., dissenting); FERC v. Mississippi, 456 U.S. 742, 788-797 (1982) (O'Connor, J., dissenting).

sovereignty, so as to ensure that the States retain their "separate and independent existence," Texas v. White, 74 U.S. 700, 725 (1869). The difficulty with National League of Cities was only that it attempted too much. See, e.g., Field, Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84, 111-13 (1985). A more satisfactory test for preserving the States' independent existence "would restrict immunity to essentially internal state activities. Such internal matters would include the organization of state and local governments . . . ." Id. at 105. "Even prior to National League of Cities, there was authority that the Court could step in to prevent the destruction of states. Opponents and supporters of

National League of Cities alike have endorsed this view of the judicial role in protecting the states." Id. at 112.

Another leading critic of National League of Cities similarly concludes that this Court retains responsibility to protect the States from certain forms of federal interference. "The real business of preserving federalism" is "protecting the structure of state government from federal intrusion." L. Tribe, American Constitutional Law § 5-23, at 396 (2d ed. 1988). "When we return to Justice Rehnquist's 'tacit postulates' -- the core assumptions about the structure of constitutional government, assumptions that surely include the meaningful existence of the states -- we recognize that National League of Cities may have been the wrong battle fought with the wrong tactics,

but in a campaign whose concerns were far from trivial and indeed had solid constitutional grounding." Id. at 397. The most fundamental concern should be with "federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves." Id. (emphasis in original).

The citizens of the several States have variously decided, through their constitutions, the most appropriate manner to select and provide tenure to their constitutional officers, including their judges. These decisions are a vital aspect of each State's character, independent existence and role as an independent governmental entity within the constitutional system.[5/]

5/ This sort of local decisionmaking was envisioned by the Framers as one of

(footnote continued)

This Court has recognized that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." Sugarman v. Dougall, 413 U.S. 634, 647 (1973). The State has a "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public officerholders." Id. at 648, citing U.S. Const. Art. IV, § 4 and the Tenth Amendment.6/

(footnote continued)

the main pillars of liberty. See, e.g., The Federalist, No. 17, at 119-20 (A. Hamilton), No. 45 at 192-93 (J. Madison), No. 46, at 298 (J. Madison), No. 51, at 323 (J. Madison) (Mentor ed. 1961).

6/ The distinction made between state

(footnote continued)

The intrusion upon the choices of the various States as to their form of government here attributed to Congress by petitioners may not seem to be an extreme attack upon the States' independent existence. But "it is highly unlikely that Congress will make a frontal attack on the existence of the states; far more likely is a gradual chipping away at state authority." Field, supra, 99 Harv. L. Rev. at 112. "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it is in the tyranny of small decisions . . .." Tribe, supra, § 5-20, at 381.

(footnote continued)

employees and constitutional officers in Sugarman also distinguishes this case from EEOC v. Wyoming, 460 U.S. 225, 243 (1983) (which upheld the application of the ADEA to state game wardens).

Because petitioners' interpretation of the ADEA would raise serious questions regarding the limits of congressional authority to regulate state governments, the statute should not be so construed. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (emphasis added); NLRB v. Catholic Bishop, 440 U.S. 490, 500-01 (1974) (before addressing difficult and sensitive constitutional questions, "there must be present the affirmative intention of Congress clearly expressed") (emphasis added).

Construing the ADEA not to apply to state judges would, consistently with the DeBartolo rule, avoid the sensitive question of the ultimate substantive limits imposed by the Tenth Amendment and the federal constitutional structure upon Congress' authority under the Commerce Clause. It would also avoid the further question, previously reserved by this Court, see EEOC v. Wyoming, 460 U.S. 226, 243 (1983), as to whether the extension of the ADEA to the States is an implicit exercise of congressional authority under section 5 of the Fourteenth Amendment.7/

7/ Although Congress has broad discretion to choose the means by which it will enforce the substantive provisions of the Fourteenth Amendment, Congress may not necessarily define or establish substantive constitutional rights. See Oregon v. Mitchell, 400 U.S. 112 (1970), holding unconstitutional a statute arguably

(footnote continued)

These serious questions may properly be avoided by construing the ADEA not to apply to state judges. Such a construction would not be "plainly contrary" to Congress' intent. See Part I(B), supra. Indeed, at least one well-respected judge, in an extended and thoughtful analysis, has concluded, without reaching the clear statement rule, that the plain meaning of the language of the ADEA excludes all state judges from coverage. EEOC v. Commonwealth of Massachusetts, supra, 680 F. Supp. at 457-462.[8/] Most other courts addressing the question, including the First Circuit, the Massachusetts Supreme Judicial Court, and the court below, have concluded that that ADEA contains no clear expression of a congressional intention to include state judges within its ambit.[9/] It would be entirely consistent with the statutory language and the legislative

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(footnote continued)

enacted under the Fourteenth Amendment and aimed at eliminating a classification based on age, where the majority emphasized that the particular discrimination -- age -- had not been identified as suspect. Id. at 117, 126-29 (Black, J.); 152, 205-09 (Harlan J.); 281, 293-96 (Stewart, J., with Burger, C.J., and Blackmun, J.). Indeed, this Court has since held that age is not a suspect classification, see Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); this was reaffirmed by the dismissal for want of a substantial federal question of Maresca v. Cuomo, 475 N.E.2d 99, 485 N.Y.S. 2d 724 (N.Y. 1984), app. dismissed, 474 U.S. 802 (1985), holding that the mandatory retirement of state court judges does not violate the Fourteenth Amendment.

8/ The amici States do not necessarily disagree with this conclusion; it is the purpose of this brief, however, to address the broader consitutional issues.

9/ See also EEOC v. State of Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); In re Stout, 559 A.2d 489 (Pa. 1989); Gondelman v. Commonwealth of Pennsylvania, 550 A.2d 814 (Pa. Cmwlth. 1988), aff'd on other grounds, 554 A.2d 896 (Pa. 1989) (all upholding state judicial mandatory retirement provisions against ADEA attack).

history of the ADEA for this Court to conclude that Congress did not intend to test the constitutional limits of its authority by intruding upon the selection and tenure of state judges.

CONCLUSION

The decision below should be affirmed in an opinion which reaffirms the constitutional principles protecting the authority of the States independently to govern themselves.

Respectfully submitted,

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Dated: February 15, 1991

ADDENDUM

Colo. Const. Art. VI, § 23

Flor. Const. Art. 5, § 8

Hawaii Const. Art. VI, § 3

Minn. Const. Art. VI, § 8

Neb. Const. Art. V

Neb. Rev. Stat. § 24.708

New Jersey Const. (1947)
Art. VI, § 6, ¶ 3

North Dakota Const. Art. VI, §§ 7, 9

North Dakota C.C. §§ 27-07.1-01;
40-14.-01; 40-15-01

Pa. Const. Art. V, § 16(b)

Puerto Rico Const. Art. V, § 10

R.I. Const. Art. 10, § 4

S.C. Const. Art. V., §§ 3, 8 and 13

S.C. Code Ann. § 20-7-1370 B (Law.
Co-op. Supp. 1989)

Wyoming Const. Art. 5, § 5

Supreme Court, U.S.
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NO. 90-50

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

v.

JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE STATE OF VERMONT OFFICE OF THE COURT ADMINISTRATOR

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INTEREST OF AMICUS CURIAE

The Office of Court Administrator, State of Vermont, is the administrative arm of the Vermont Supreme Court responsible for direction and supervision of all courts within the State. In 1989, the Office of Court Administrator attempted to enforce as to Justice Louis Peck, a duly appointed and confirmed member of the Vermont Supreme Court who had reached the age of 70 years, §35, Chapter II, of the Vermont Constitution which provides:

> All justices of the Supreme Court and judges of all subordinate courts shall be retired at the end of the calendar year in which they attain seventy years of age or at the end of the term of election during which they attain seventy years of age, as the case may be, and shall be pensioned as provided by law. The chief justice may from time to time appoint retired justices and judges to special assignments as permitted under the rules of the Supreme Court.

The United States Equal Employment Opportunity Commission ("EEOC"), proceeding under the Age Discrimination in Employment Act ("ADEA") sought and obtained a permanent injunction against enforcement of this mandatory retirement provision of Vermont's Constitution. EEOC v. Vermont, 717 F.Supp. 261 (D. Vt. 1989). On appeal, the permanent injunction was affirmed in an opinion heavily relied upon by petitioners in the instant case. EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (Pet. Br. pp. 14, 18, 20, 22, 24).

The principal arguments of Vermont's two briefs in that appeal were founded on the requirement, enunciated by this Court, that Congressional legislation

purporting to alter the federal-state balance must contain in the languages of the statute a clear statement of Congressional intent to alter that balance. These arguments were summarily rejected without discussion in the Second Circuit opinion and Vermont remains enjoined from enforcing its Constitution.

Those arguments are now offered to this Court in this amicus curiae brief in the hope and expectation that the Opinion and Order rendered herein will preserve for the citizens of Missouri, Vermont and of other states the rights guaranteed by the Tenth Amendment to the United States Constitution to establish and regulate their respective courts.

SUMMARY OF ARGUMENT

I. The Framers Of The United States Constitution reserved to the states

the right and power to establish their respective courts and the qualifications of their judiciaries. Congress did not make clear in the language of the ADEA that it intended to cover appointed state judges in abrogation of State Constitutions and laws which mandate their retirement and therefore the ADEA must be construed to avoid that result.

II. Application Of the ADEA to State judges would exceed limitations of the United States Constitution of federal actions affecting the States.

ARGUMENT

I. Congress Did Not Make Clear In The Language Of The ADEA That It Intended To Cover Appointed State Judges In Abrogation Of State Constitutions Which Mandate Their Retirement And Therefore The ADEA Must Be Construed To Avoid That Result.

A. Introduction

Just one month before the United States District Court for the Eastern District of Missouri decided the instant case, the United States Supreme Court twice repeated its admonition in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985), that when Congress wishes to alter the "usual constitutional balance between the States and the Federal Government," it must make its

intention to do so "unmistakably clear in the language of the statute." Will v. Michigan, 491 U.S. ___, 105 L.Ed. 2d 45, 54 (1989), Dellmuth v. Muth, 491 U.S ___, 105 L.Ed. 2d 181, 189.

For two hundred years, that usual constitutional balance preserved for the states the power to prescribe the qualifications of its officers including "important non-elective executive, legislative, and judicial positions." Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (emphasis added). Application of the ADEA to override the State Constitutional mandates retiring Justices based on age substantially alters that balance.

Despite the repeated and recent admonitions by the United States Supreme Court that imperfect confidence regarding

the intent of Congress will not suffice given the special constitutional concerns, Dellmuth, supra, 491 U.S. ____, 105 L.Ed. 2d 190. Petitioners ignore the clear statement requirement and urge that the ADEA is a remedial statute and therefore the ambiguity in its coverage should be broadly construed. (Pet. Br. 15). The District Court in Vermont went further, dispensed with the need for Congressional intent altogether and deferred to agency interpretation. "Even if the language of the statute were vague and the intent of Congress indiscernible, this Court should defer to the EEOC's construction of the ADEA because its construction is reasonable." 717 F.Supp. at 267. Both of these approaches ignore the applicable Constitutional standards of statutory construction mandated by the

opinions of this Court and must be rejected.

B. The Framers Of The Constitution Reserved To The States The Right And Power To Establish Their Respective Courts And The Qualifications Of Their Judiciaries.

The government proposed at the Constitutional Convention of 1787 and adopted by the States "cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects." The Federalist, No. 39, at 245 (J. Madison) (Mentor ed. 1961) (original emphasis). The other objects to which the powers left to the several states extend are those "which, in the ordinary course of affairs, concern the

lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Id., No. 45 at 293 (J. Madison).

By 1789, in enacting the Tenth Amendment, the First Congress made specific that which James Madison had reported:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Consequently, by 1798, this Court, found it

> a self-evident proposition that the several State Legislatures retain all the powers of legislation delegated to them by the State Constitutions, which are not EXPRESSLY taken away by the Constitution of the United States. The establishing courts of justice, the making regulations for the administration of justice, within each state, according to its laws ... appear to me to be the peculiar and exclusive province and duty of the State legislatures.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) (original emphasis).

In 1973, this Court, quoting passim from Oregon v. Mitchell, 400 U.S. 112 (1970), reaffirmed that, as provided in the Tenth Amendment, the States kept for themselves "the power to prescribe the qualifications of its [judicial] officers and the manner in which they shall be chosen." Sugarman v. Dougall, supra, 413 U.S. at 647.

C. Congress Did Not Make Clear In The Language Of The ADEA That It Intended To Shift The Usual Constitutional Balance Regarding State Judiciaries.

To meet the requirements of Atascadero, supra, Congress was thus required to make "unmistakably clear in

the language of the statute" that ADEA was intended to cover appointed judges. The ADEA does not mention judges, but Petitioners nonetheless deduce that appointed judges .. but not elected ones .. are covered.[1] Deductions, however reasonable in usual statutory construction when the Tenth Amendment is not implicated, do not meet the requirement of a clear statement in the words of the statute unless all other alternative deductions are confidently excluded. Dellmuth v. Muth, ___ U.S. ___, 105 L.Ed. 2d 190. This Court there stated:

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[1]Following Garcia v. San Antonio Transit Authority, 469 U.S. 528 (1985), which relies on Congress to protect basic states rights, omission of reference to judges or judiciary may preclude, ipso facto, application of a law to the judicial system. See Point II, infra p. 32.

> Rather, the salient point in our view is that it cannot be said with perfect confidence that Congress in fact intended in 1975 to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area. Cf. Johnson v. Robison, 415 U.S. 361, 373-374 (1974) (federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

105 L.Ed. 2d 189-90.

Apparently acknowledging a lack of clarity in the language of ADEA, Petitioners employ a deft analysis of the legislative history of ADEA's possible statutory ancestor which they contend supports the construction of the ADEA they urge upon this Court. (Pet. Br. 18-21). The flaw in their argument is that legislative history, even if informative and relevant, is insufficient to support a construction which would, if accepted, alter the usual constitutional balance

between the States and the Federal Government because Congress has not made its intention to alter that balance unmistakably clear in the language of the statute. Will v. Michigan, supra, 491 U.S. ___, and Dellmuth v. Muth, supra, 491 U.S. ___, 105 L.Ed. 2d 181, 189 (1989), both quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (emphasis added). Dellmuth also held that "[l]egislative history generally will be irrelevant to a judicial inquiry" regarding Congressional intent because the intent must be clear in the language of the statute itself. 105 L.Ed. 2d 189.

Perhaps the best evidence that the statutory language is unclear is that after consideration of Petitioners' lengthy statutory exegesis and analysis

of the legislative history, it still cannot be said with any confidence that Congress intended to abrogate State Constitutions mandating retirement of appointed judges at age 70. In Dellmuth, supra, this Court, in an Eleventh Amendment case, required that perfect confidence in the intent of Congress be established before the Federal/State balance will be shifted. Petitioners may argue that the clear statement rule is not applicable because Atascadero, Dellmuth and Will all involve the Eleventh Amendment. But this Court had anticipated that argument in Will[2] and rejected it:

> Atascadero was an Eleventh Amendment

[2]In Will, the State of Michigan was sued in its own Court where the Eleventh Amendment does not apply. Maine v. Thiboutot, 448 U.S. 1, 9 n. 7 (1980). Will, supra, 105 L.Ed. 2d at 53.

> case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to preempt the historic powers of the States, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16 (1981); South Dakota v. Dole, 483 U.S. 203, 207 (1987). In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. United States v. Bass, 404 U.S. 336, 349 (1971).

491 U.S. ____, 105 L.Ed. 2d 54.

The construction of ADEA urged by Petitioners clearly would affect the federal balance in a traditionally sensitive area, because it restricts the power of a State to prescribe qualifications of its officers, including judicial officers. See, Sugarman v. Dougall, supra, 413 U.S. at 647. The

absence of a clear statement deprives this Court of the assurance required by Bass, supra, that Congress faced and intended to bring into issue the critical issue presented in this case, that is, whether Congress intended to override state constitutions, like that of Missouri or Vermont, which mandate retirement of judges at age 70. Indeed, the sequence of separate congressional enactments of which the ADEA is now composed makes it doubtful that any member of Congress intended to abrogate state constitutions or was aware of the risk that EEOC or Petitioners someday might claim such Congressional intent.

When first enacted in 1967, the ADEA did not apply to the states or their political subdivisions at all. In 1974, as a corollary to the extension of the

Fair Labor Standards Act ("FLSA") to the States, Congress also extended the ADEA to the States. The method for both extensions was a definition of state and local government "employees" apparently borrowed from the 1972 extension of Title VII to States in the Equal Employment Opportunity Act of 1972.

Even if Petitioners' construction of those definitions were correct, -- and it is not -- members of Congress would have had no reason to suspect that extension of either FLSA or ADEA would affect state judges because they apparently were excepted from the wage and hour provisions of FLSA as professionals (29 U.S.C. §213(a)) and the ADEA covered only those individuals who were between 40 and 65. Even when the coverage was extended to persons up to age 70 in 1978, no

conflict with state constitutions was evident, perhaps because no state constitution mandated retirement before age 70.

In 1986, effective January 1, 1987, Congress eliminated the age ceiling and extended the ADEA to all covered "employees" private and public, over 40. Only then was the ADEA arguably in conflict with State constitutions and only then would Congress have had reason to consider whether ADEA applied to appointed state judges. A review of the legislative history of the 1986 enactment reveals not a shred of evidence that Congress was even aware of the potential conflict. See 1986 U.S. Code Cong. and Adm. News, pp. 42 and 5628.

Petitioners review the debates between Senators Ervin, Javits and

Williams before enactment of the definitions of "employee" during the 92nd Congres[3] when the issue was discrimination in employment by States, founded not on age but on race, color,

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[3]Because Senators Ervin (N.C.) and Javits (N.Y.) each came from a state which at that time elected its Supreme Court Justices, neither could be relied on to protect the interests of states with appointed justices. In 1972, when the Title VII definitions of state employees was enacted, Vermont's justices were still elected by the legislature, but Vermont's Constitution was changed in 1974 to provide for appointment by the Governor. Ch. II §32, Vermont Constitution; (amendment certified to Secretary of State, October 31, 1974). When the critical definitions were debated by the Senate on February 17, 1972, both of Vermont's senators were absent attending meetings of the Canadian Interparliementary Union. 118 Cong. Rec. 4494 (1972); Legislative History of the Equal Employment Opportunity Act of 1972, pp. 1644-45. In any event, Vermont's Senators had no reason to fear that Title VII's protections against racial, religious or sexual discrimination would conflict with laws or practices regarding composition of Vermont's Courts.

religion, sex or national origin. (Pet. Br. 19-21). Based on that review, Petitioners ask this Court to find in those 1972 debates the clear intent lacking fourteen years later in 1986, when the 99th Congress enacted the first age discrimination amendments arguably to conflict with State constitutions. The ADEA had been applicable to States for 12 years but there had been no occasion for the EEOC or anyone else to urge its application to appointed state judges because there would have been no mandatory retirements of appointed judges under 65. Thus, it is not surprising that the 1986 legislative history is silent on the intent of Congress with respect to mandatory retirement of appointed state judges because there had been no focus on the issue to alert

Senators and Representatives from those few states with appointed judges and mandatory retirement provisions. The remaining Senators and Representatives from states with either elected judges or no mandatory retirement had no reason to be aware of or concerned about the extension of ADEA to appointed state judges over 70. Assurance that Congress "has in fact faced and intended to bring into issue" the critical matters raised in this lawsuit, as required by Will and Bass, is lacking not only in the language of the statute but also the legislative history.

Petitioners have ignored the clear statement cases in their brief and thus misapprehend the significance of the requirement, especially in light of Garcia v. San Antonio Metropolitan

Transit Authority, supra, 469 U.S. 528, and South Carolina v. Baker, 485 U.S. 505 (1988). In overruling National League of Cities v. Ussery, 426 U.S. 833 (1976), this Court determined -- some would say unwisely -- to rely primarily on the States' participation in the national political process, particularly States' representation in Congress. The clear statement requirement is a critical part of the process and lacking in this case.

Petitioners may contend that the requirement for a clear statement, if it exists in a Tenth Amendment context, was met because Congress made clear in the 1974 extension of the ADEA that it intended to cover employees of states. That contention fails to acknowledge both that ambiguity exists in the definition of employee and that different categories

of employees present federal/State constitutional concerns of vastly varying degrees. EEOC v. Wyoming, 460 U.S. 226 (1983), does not hold, as Petitioners suggest (Pet. Br. 13), that extension of ADEA to all state and local employees is consistent with the Tenth Amendment.[4] Decided before this Court overruled the doctrine of immunity articulated in National League of Cities, supra, EEOC v. Wyoming held only that application of the ADEA to a 55 year old game warden was federal intrusion sufficiently less serious than the intrusion in National League of Cities to make it unnecessary

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[4]The term "the Tenth Amendment" is used to encompass any implied constitutional limitation on Congress' authority to regulate state activities whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution. South Carolina v. Baker, 485 U.S. 505, 511 n. 4 (1988).

to override Congress' express authority in that case. 460 U.S. at 239.

If Warden Crump had been State Supreme Court Justice Crump, two different and important factors would have been present: first, it seems unlikely that this Court would have found the intrusion "less serious" than the extension of wage and hour laws to public sector employees in National League of Cities; second, the clear statement issue resulting from the ambiguity in the exception for "appointees at the policy-making level," a definition clearly inapplicable to game wardens but at least facially applicable to some state judges or justices, would have led to an opinion undoubtedly different in content and almost certainly different in result.

When Congress extended the ADEA to

the States in 1974, it clearly knew, intended and stated that employees such as game wardens were covered by the Act and that conflicting mandatory retirement laws[5] of the States would be abrogated. By contrast, in 1974, Congress had no reason to expect that the constitutions of Missouri, Vermont and other states, mandating retirement of judges at 70, would be abrogated by the extension because the ADEA at that time clearly did not apply to anyone 65 and over. In 1974, when the definition of state employees in the ADEA was enacted -- and the exclusions from that definition -- only extraordinary and unrealistic

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[5]When extended to the States in 1974, the ADEA protected employees between the age of 40 and 65. Congress undoubtedly was aware that many state and local law enforcement officers were subject to early mandatory requirements, sometimes at ages as young as 50.

prescience by the Congress would have alerted the drafters to the possibility that twelve years later the age ceiling would be lifted and that a small category of judges, -- those who are appointed, not elected -- would be covered.

Petitioners may contend, as EEOC did in the Vermont case, that requiring a clear statement of intent to cover appointed judges would lead to the absurd result that no job categories are covered, since Congress did not explicitly include <u>any</u> particular class of officials when it extended the ADEA to the states and Congress would have had to explicitly list every position in every state government it wished to cover. The argument would be specious. Appointed judges may be the only category where ambiguity exists. Clearly, all executive

branch appointees at the policy making level, made by an executive branch elected official, are excluded from coverage as long as they are not in the civil service. Appointees at the policy-making level made by elected judges within the judicial branch, and by elected legislators within the legislative branch, also would be excluded. It is only because appointed judges serve in a branch of government other than the branch that appointed them that Petitioners are able to make the argument that appointed judges are not excluded from the coverage of ADEA. If, as Petitioners argue, Congress had intended to limit the exclusion to appointees at the policy making level within the executive branch -- or to appointees within the branch of the

elected official who makes the appointment -- it could have and should have made its intention clear within the language of the statute.

Petitioners may argue that EEOC v. Wyoming, supra, decided that ADEA coverage of state and local government employees does not unduly intrude on state sovereignty because states retain other means to accomplish the policy goals imbedded in mandatory requirement programs. Such an argument would read that case too broadly. This Court found that the State of Wyoming claimed "no substantial stake in their retirement policy other than assur[ing] the physical preparedness of Wyoming wardens to perform their duties.'" 460 U.S. at 239. While other means, such as establishing bona fide occupational qualifications or

using case by case adjudication, may be available to accomplish the goal of assuring physical preparedness of game wardens, those means would be less effective for evaluating the continued competency of judges where the subtle factors of judgment, energy, flexibility and temperament, among others, are critical. Individual adjudications of competency necessarily would be attended by unacceptable risks of injury to effective, collegial and efficient functioning of the Courts and to public confidence in the quality of justice. Who would decide when a judge had become incompetent and what are the standards? Should four of Vermont's Supreme Court Justices be expected to testify for or against the fifth? The citizens of Vermont and Missouri, by enacting and

adopting their Constitution, rightfully chose to avoid such damaging spectacles.

Moreover, assuring continued competency of judges does not satisfy the highest aspirations of the citizens of Missouri, Vermont or other states with mandatory retirement provisions concerning their respective judiciaries. Citizens of those states, seeking the higher goal of judicial excellence, may have concluded that such excellence is more likely to be achieved by the periodic infusion of new energy through the appointment of judges who attended law school more recently or who are more responsive to the times. Commentators sometimes refer to the long, distinguished career of Oliver Wendell Holmes, who resigned from this Court at 92 after 30 years service. But, who is

to say that the nation would not have been better served for some of those later years by the earlier appointment of a younger Benjamin Cardozo, who died after only six years on the Court?

The question for this Court, however, is not the wisdom of the choice made by a State concerning its judiciary. Wise or not, the citizens of the States have the right to make judgments about the qualifications of their judges and those of Missouri and Vermont have done so in their Constitutions. There is no clear statement in the language of the ADEA that Congress intended to deprive them of that right. The ADEA must be construed then to avoid abrogating mandatory retirement provisions of State Constitutions.

II. Application Of The ADEA To State Judges Would Exceed Constitutional Limitations On Federal Action Affecting The States.

Even if Congress had stated clearly its intent to override the judgment of the citizens of Missouri or Vermont, as expressed in the mandatory retirement provisions for judges contained in these State Constitutions, the extension of the ADEA to appointed State judges would violate the Tenth Amendment.[6]

Congress based its exercise of legislative power in the ADEA exclusively on the Commerce Clause. 29 U.S. §621(a)(4). Justice Powell, dissenting

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[6]Or the principles of federalism drawn generally from the Constitution. See, p. 23 fn. 4, supra.

in Garcia, supra, noted that the services performed by state and local governments are "remote from any normal concept of interstate commerce," and he was speaking of services like fire prevention, police protection, sanitation and public health. (469 U.S. at 575) By extension of his reasoning, it is very difficult to imagine how the retirement of a Missouri trial judge or a Vermont Supreme Court Justice, for example, has any bearing whatsoever on the flow of goods and services in interstate commerce.

Moreover, the Court in Garcia, although relying for limitations on the exercise of Commerce Clause power initially and primarily on the national political process, also recognized the possibility of other judicially enforced limitations:

> "These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."

469 U.S. at 556. As Professor Tribe noted, the real business of preserving federalism ... [is] protecting the structure of state government from federal intrusion." (L. Tribe, American Constitutional Law §5-23, at 396 (2d ed. 1988). If an abrogation of the States' prerogatives in selecting the qualifications of its Constitutional officers, particularly Supreme Court Justices, is not prohibited by the Tenth Amendment, then little state autonomy remains to be exercised because citizen control of who governs is surely more important than where. Compare, Coyle v. Oklahoma, 221 U.S. 559 (1911) (Congress lacks the power to dictate location of a

state capitol).[7]

In South Carolina v. Baker, 485 U.S. 505, 512 (1988), this Court repeated that judicial review of Congressional action remains a possibility after Garcia, but with an emphasis on process:

> Although Garcia left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in Garcia had no occasion to identify or define the defects that might lead to such invalidation.

The legislative process which led to the conflict between the purported extension of the ADEA to appointed judges and state constitutional mandatory retirement provisions gave little or no opportunity for protection of the

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[7] See also South Carolina v. Baker, 485 U.S. 505, 528 (Scalia, J., concurring); 485 U.S. at 530 (O'Connor, J., dissenting).

legitimate interests of affected states. Because less than a third of the states have appointed judges of any sort and only a few of those mandate retirement at 70, a small minority can be said to have been "singled out in a way that left [them] politically isolated and powerless." 485 U.S. 513.

Thus, if this Court accepts the interpretation of the ADEA urged by Petitioners, it should also find that the structure of state governments has been violated by that interpretation. Because the legislative process was defective, this Court should act to protect the rights of the citizens of Missouri and Vermont to govern themselves on purely State matters as guaranteed by the Constitutional principles of federalism and declare that the extension of ADEA to

appointed state judges violates the Tenth Amendment.

CONCLUSION

The Decision of the Eighth Circuit should be affirmed in an opinion which reflects the principles of federalism embodied in the United States Constitution.

Respectfully submitted at Burlington, Vermont, this 15th day of February, 1991.

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